Supreme Court, U.S.
FILED

No. _____

10-109 JUL 19 2010

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IN THE

Supreme Court of the United States

ANTHONY DISMUKE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Wisconsin State Statute contains a two-pronged offense for vehicular fleeing. To fall under the first prong, an offender needs to endanger the operation of a police vehicle, traffic officer, or pedestrians. The second prong does not depend on whether anyone or thing be endangered, rather it applies when the offender increases his speed or extinguishes the vehicle's lights to flee.

Does a conviction for attempting to flee or elude a police officer in a motor vehicle under only the second prong of such a fleeing statute constitute a "violent felony" under the residual clause of section 924(e)(2)(B)(ii) of the Armed Career Criminal Act?

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The opinion of the Court of Appeals in Petitioner's petition for review is published and reported at 593 F.3d 582 (7th Cir. 2010), and reprinted at Pet. App. 1a-28a. The District Court's sentencing opinion and pre-trial decision are reprinted at Pet. App. 29a-38a and Pet. App. 39a-50a, respectively. The Court of Appeals' denial of Petitioner's petition for rehearing and rehearing *en banc* is reprinted at Pet. App. 51a-52a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 2010, and Petitioner's petition for rehearing and rehearing *en banc* was denied on April 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case revolves around the interpretation of 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act ("ACCA"), which provides:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another* . . . .

(Emphasis added). The italicized phrase is the key provision at issue here.

INTRODUCTION

On January 29, 2007, on a tip from an anonymous informant, the Milwaukee police barged into the residence at 2528 W. Locust Street, breaking out the windows, and throwing stun grenades. They expected and were prepared to find an arms dealer. Instead, the police officers found 51-year-old Anthony Dismuke babysitting his 12 year-old granddaughter. After handcuffing both Mr. Dismuke and his granddaughter, the officers did not find a basement or any room full of weapons. Their search netted two guns. Although Mr. Dismuke was not the arms dealer the police were prepared for, applying the Armed Career Criminal Act ("ACCA"), the district court was able to sentence him like one. Mr. Dismuke was sentenced to 15 years of imprisonment, Pet. App. at 38a, even though the district court found that the "record contained no evidence" that he "ever used" or "carried" the guns at issue. *Id.* at 36a.

Under section 924(e)(1) of the ACCA, a felon convicted for possession of a firearm who has three previous "violent felony" convictions, is subject to a mandatory minimum sentence of 15 years imprisonment. The court concluded that Mr. Dismuke had three such convictions. Pet. App. 33a-34a. The third conviction relied on by the district court is the subject of this appeal. In 1998, Mr. Dismuke was convicted of vehicular fleeing under Wisconsin state law. *Id.* at 31a. The analysis of whether Mr. Dismuke's 12 year-old fleeing conviction is a qualifying violent felony turns on the interpretation of the ACCA's residual clause. 18 U.S.C. § 924(e)(2)(B)(ii). This Court held in *Begay v. United States*, 553 U.S. 137, 144-45 (2008), that an offense falls under the residual clause if it is similar in risk and kind to the ACCA's enumerated crimes.

The Seventh Circuit held that Mr. Dismuke was charged with the type of fleeing set forth in the second part of the Wisconsin statute. Pet. App. 16a. That part excludes conduct that endangers anyone or anything. In fact, a person need only to flee by increasing speed or extinguishing the vehicle's lights to violate the second part. Wis. Stat. § 346.04(3) (1998). Nonetheless, the Seventh Circuit found that the second part of Wisconsin's fleeing statute fell within the ACCA's residual clause and was thus a violent felony. Pet. App. at 28a.

That decision reinforced an entrenched and irreconcilable split among six circuits on whether nonviolent vehicular fleeing satisfies *Begay's* two-part test. The Eighth and Eleventh Circuits have

found that nonviolent fleeing offenses criminalize conduct that neither presents a serious potential risk of injury, nor is violent or aggressive. Also, in an unpublished decision, the Ninth Circuit reached the same outcome. The Fifth, Sixth, Seventh, and Tenth Circuits have found that such nonviolent fleeing puts officers, pedestrians, and other motorists in serious potential risk of injury, and is purposeful, aggressive, and violent conduct. *See, e.g.*, Pet. App. at 26a-27a. In a similar case before the Seventh Circuit, however, Judge Richard Posner called for this Court to find that such fleeing is not a violent felony. *Welch v. United States*, 604 F.3d 408, 433-35 (7th Cir. 2010) (Posner, J., dissenting). Indeed, only this Court can settle the issue and end the conflict between the circuits.

In addition, those circuits that are holding that nonviolent vehicular fleeing satisfies *Begay's* test, like the Seventh Circuit did here, are misapplying this Court's ACCA precedent. This Court's intervention is needed to correct this misapplication of the law.

STATEMENT OF THE CASE

Statement of Facts

On January 29, 2007, Anthony Dismuke was 51 years old, and visiting his 12-year-old granddaughter, Aniyiah. (Trial Tr. Vol. 1, 31, Nov. 5, 2007.) Mr. Dismuke offered to baby sit and help Aniyiah with her homework, because she was having trouble in school. (*Id.* at 139.) After fixing Aniyiah a snack, Mr. Dismuke left her briefly in the living

room while he went to the basement. (*Id.* at 139-40.) When her grandfather was in the basement, Aniyiah noticed people lining up on the porch and "busting out all the windows." (*Id.* at 140.) Aniyiah yelled for her "Papa," as the people outside shot something in the window, which sounded like a gunshot. (*Id.* at 141.) A swarm of officers from the Milwaukee Police Department then stormed the house, guns drawn, and handcuffed both Mr. Dismuke and his adolescent granddaughter. (*Id.* at 141-42.)

Executing a search warrant based on a confidential informant, the officers found two guns in a bedroom at 2528 West Locust Street in Milwaukee. Pet. App. at 36a, 40a-41a. Mr. Dismuke challenged the constitutionality of the search warrant,[1] *id.* at 39a, and disputed that he lived at the residence or possessed the guns in question. *Id.* at 36a. Nevertheless, Mr. Dismuke was indicted, and eventually convicted of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). *Id.* at 29a. The district court, however, found that Mr. Dismuke's offense "was not in any way aggravated," because "the record contained no evidence that [he] ever used the guns, threatened anyone with them, or carried them on his person." *Id.* at 36a.

The pre-sentence report ("PSR") concluded that Mr. Dismuke qualified as an armed career criminal

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[1] The district court denied Mr. Dismuke's motion to suppress, and the Seventh Circuit later affirmed this ruling. Pet. App. at 5a-11a. Mr. Dismuke continues to object to the propriety of the search and argues that evidence found during the search should be suppressed.

under 18 U.S.C. § 924(e)(1), which carries a 15-year mandatory minimum sentence of imprisonment. Pet. App. at 30a. One of the convictions that the PSR cited as the basis for Mr. Dismuke's armed career criminal enhancement was his 12-year old 1998 conviction for attempting to elude a police officer in violation of Wisconsin statute section 364.04(3). Pet. App. at 30a-31a. The district court then determined that his conviction qualified as a violent felony under the ACCA. *Id.* at 31a-33a. On appeal, the Seventh Circuit affirmed, finding that the second part of the Wisconsin vehicular fleeing statute satisfied the requirements for a violent felony articulated by this Court in *Begay*. *Id.* at 15a-27a. But the Seventh Circuit acknowledged that circuits are split on the issue of whether certain vehicular fleeing constitutes a violent felony. *Id.* at 28a. On April 19, 2010, the Seventh Circuit denied Mr. Dismuke's petition for rehearing and rehearing *en banc*. *Id.* at 52a.

ACCA Statutory Background

Section 924(e)(1) of the ACCA provides a mandatory minimum sentence of 15 years of imprisonment for "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1).[2] Section

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[2] Section 922(g), in relevant part, makes it "unlawful for any person . . . who has been convicted in any court of, a crime punishable for a term exceeding one year" to possess "any firearm or ammunition." 18 U.S.C. § 922(g)(1).

924(e)(2)(B) defines a "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Since the ACCA was enacted, this Court has interpreted the contours of the "violent felony" definition multiple times, especially as to which crimes fall into what has become a particularly problematic clause, the ACCA's residual clause—"otherwise involves conduct that presents a serious potential risk of physical injury to another."

In *Taylor v. United States*, 495 U.S. 575, 600 (1990), this Court held that the analysis of whether a prior conviction constituted a violent felony was limited to a formal "categorical approach": "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those

convictions." This Court also recognized in certain cases, where the statute at issue includes a broad range of conduct, that the sentencing court can apply a "modified" categorical approach and look to "the indictment or information and jury instruction" to determine which part of the statute the defendant violated. *Id.* at 602. In *James v. United States*, 550 U.S. 192, 208 (2007), this Court further clarified that under the categorical approach "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk on injury to another." The sentencing court does not need to determine if "every conceivable factual offense covered by a statute must necessarily present" such a risk. *Id.*

In *Begay v. United States*, 553 U.S. 137 (2008), this Court held that for an offense to fall under the ACCA's residual clause it must (1) "present[] a serious potential risk of physical injury to another" similar to the enumerated crimes, *id.* at 142, and (2) be similar in kind to those crimes, in that it must "involve purposeful, violent, and aggressive conduct." *Id.* at 144-45 (citation and internal marks omitted). This Court also noted that *Begay's* two-part test required "a crime-by-crime analysis." *Id.* at 143. Applying that two-part test, this Court assumed that a DUI presents a serious potential risk of injury, *id.* at 141, but still held that the offense was not a violent felony because it was a crime of "negligence or recklessness" not "associated with a likelihood of future violent, aggressive, and purposeful 'armed criminal' behavior." *Id.* at 146-48.

In *Chambers v. United States*, 129 S. Ct. 687, 691-92 (2009), this Court held that failure to report to periodic imprisonment did not present a serious potential risk of physical injury. In addition, this Court held that a failure to report did not fulfill *Begay's* similar-in-kind requirement, noting that it was a "far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender" commits one of the ACCA's enumerated crimes. *Id.* at 692 (citing *Begay*, 553 U.S. at 144-45) (internal marks omitted).

The Wisconsin Vehicular Fleeing Statute

The Wisconsin vehicular fleeing statute at issue here is entitled "Obedience to traffic officers, signs and signals; fleeing from an officer," and reads as follows:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Wis. Stat. § 346.04(3). In this case, the Seventh Circuit concluded that the Wisconsin statute contains two distinct parts: (1) eluding "so as to interfere with or endanger the operation of the police

vehicle," "traffic officer" or "pedestrians"; and (2) "increas[ing] the speed of the operator's vehicle or extinguish[ing] the lights" to elude. Pet. App. at 15a-16a (quoting Wis. Stat § 346.04(3)) (alterations in original). The Seventh Circuit applied the modified categorical approach, considering each prong of the Wisconsin statute separately. *Id.* Based on Mr. Dismuke's charging documents, the Seventh Circuit placed him in the second part of the statute, *id.* at 16a,—"the operator [shall not] increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee" Wis. Stat. § 346.04(3). Notably, the court did not place him in the part that revolves around endangerment of a police officer, other motorists, or pedestrians.

REASONS FOR GRANTING THE PETITION

This Court should exercise certiorari review over this case for at least two reasons. First, and most significantly, six regional circuits have weighed in on the issue at hand and have reached disparate, irreconcilable, and non-uniform results. Second, the Seventh Circuit, and other circuits, have decided this important federal question in a manner that conflicts with this Court's guiding ACCA precedent.

I. A Significant And Entrenched Split Among The Six Circuits That Have Weighed In On The Issue Is Creating Disparate Results.

Currently, six circuits have directly decided the issue of whether a vehicular fleeing statute, which does not depend on whether an offender endangers

anyone or flees at a high rate of speed, meets *Begay's* two-part test. Two of those circuits have concluded that such offenses do not meet the test, and four circuits have reached the opposite conclusion. What is more, those same circuits are split on both parts of *Begay's* test. The two circuits have held that such nonviolent fleeing does not meet either part of the test. The other four circuits have found that it satisfies both parts. The *Begay* test requires that a "crime must (1) present a serious potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives; and (2) involve the same or similar kind of 'purposeful, violent, and aggressive' conduct as the enumerated crimes." Pet. App. at 16a-17a.

A. Two Circuits Hold That Nonviolent Vehicular Fleeing Does Not Satisfy *Begay's* Test.

The two circuits that have carefully considered the elements of the nonviolent vehicular fleeing statutes before them, like the one at issue here, have concluded that such statutes do not qualify as a violent felony (or a "crime of violence").[3] Specifically,

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[3] Courts must classify a defendant's prior offenses as a "crime of violence" to designate them a "career offender" under the Federal Sentencing Guidelines. *U.S. Sentencing Guidelines Manual* § 4B1.1. The definition of a "crime of violence" under *Guidelines Manual* section 4B1.2(a) is almost exactly the same as the ACCA's definition of "violent felony," including the same residual clause. Federal district courts apply ACCA precedent to determine "crime of violence" questions, and vice versa. *See, e.g., United States v. Wise*, 597 F.3d 1141, 1145 (10th Cir. 2010)

the Eighth and Eleventh Circuits have held that these fleeing statutes do not meet either part of *Begay's* test, concluding that the offenses do not present a serious risk of physical injury, nor are they violent and aggressive.[4] *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009); *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009).

In *Tyler*, the Eighth Circuit noted that under Minnesota's fleeing statute "[n]either high speed nor reckless driving" were elements: rather it "requires only that a perpetrator 'increase speed, extinguish motor vehicle headlights or taillights, [or] refuse to stop . . . with intent to attempt to elude a peace officer.'"[5] 580 F.3d at 725 (quoting Minn. Stat.

(looking to "cases construing the ACCA's parallel [residual clause] provision" for guidance interpreting "crime of violence").

[4] Although, as the Seventh Circuit has explained, the circuits are not split on the issue of whether vehicular fleeing constitutes "purposeful" conduct, Pet. App. at 21a, Mr. Dismuke advances the argument raised by Judge Posner in his dissent in *Welch*. In that case, Judge Posner argued that the ACCA's "purposeful" requirement should be limited to crimes where the offender must attempt to "harm a person's person or property, which is characteristic of the enumerated crimes." 604 F.3d at 434 (Posner, J., dissenting). As Judge Posner aptly noted, "[a]dopting a rule that would exclude from the category of 'violent felony' a crime that while it may be dangerous does not involve any intention of harming anyone would go some distance toward clarifying the meaning of 'violent felony' and by doing so check the avalanche of litigation over that meaning." *Id.*

[5] The Minnesota fleeing statute in relevant parts reads as follows:

§ 609.487(1)) (alteration and ellipsis in original). Indeed, the Eighth Circuit highlighted that a separate subdivision of the statute criminalizes flight that causes "bodily injury to any person other than the perpetrator." *Id.* (quoting Minn. Stat. § 609.487(4)). Consequently, the Eighth Circuit held that Minnesota's statute did not "typically involve conduct that presents a serious potential risk of physical injury to another." *Id.* (citation and marks omitted); *see also United States v. Furqueron*, 605 F.3d 612, 613 (8th Cir. 2010) (finding the same under the ACCA). Sticking to the statute's stated elements, the Eighth Circuit held that it also did not meet the second part of *Begay's* test, finding that "the elements of the statute do not require a confrontation, chase, or any other conduct indicating that the crime in question . . . is violent and

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> **Subd. 3. Fleeing officer; motor vehicle.** Whoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, is guilty of a felony and may be sentenced to imprisonment for not more than three years and one day or to payment of a fine of not more than $5,000, or both.
>
> **Subdivision 1. Flee; definition.** For purposes of this section, the term "flee" means to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle.

Tyler, 580 F.3d at 724 (quoting Minn. Stat. § 609.487(1), (3)).

aggressive." *Tyler*, 580 F.3d at 725. Much like the crime at issue here.

In *Harrison*, the Eleventh Circuit reached the same conclusion in its analysis of the second subsection of Florida's fleeing statute.[6] 558 F.3d at 1293-96. The Eleventh Circuit explained that "the behavior underlying Florida's willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on—but without high speed or recklessness—makes it unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer." *Id.* at 1294. As such, the Eleventh Circuit found that such "disobedience" did not satisfy the first part of *Begay's* test. *Id.* For similar reasons, the Eleventh Circuit held that the statute did not satisfy the test's second part as well, concluding that "disobeying a police officer's signal and continuing to drive on, without high speed or reckless conduct, is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes." *Id.* at 1295.[7]

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[6] The Florida fleeing statute in relevant part reads: "*Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree . . . .*" *Harrison*, 558 F.3d at 1290 n.16 (quoting Fla. Stat. § 316.1935(2) (1999)) (emphasis and ellipsis in original).

[7] The Eighth and the Eleventh Circuits have demonstrated a case-by-case approach to the application of *Begay*. Consistent with that approach both circuits have reached the opposite

B. Four Circuits Have Found That Nonviolent Vehicular Fleeing Satisfies *Begay's* Test.

Not all Circuits have analyzed the elements of vehicular fleeing statutes as carefully as the Eighth and Eleventh Circuits. As a result, the Fifth, Sixth, Seventh, and Tenth Circuits have all split with the Eighth and Eleventh Circuits and held that violations of nonviolent vehicular fleeing statutes satisfy both parts of *Begay's* test. Pet. App. at 11a-28a; *United States v. Young*, 580 F.3d 373 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1723 (2010); *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009), *cert denied*, 130 S. Ct. 1015 (2009); United *States v. West*, 550 F.3d 952 (10th Cir. 2008).

In this case, the Seventh Circuit applied the modified categorical approach and limited its review to the second part of Wisconsin's vehicular fleeing statute, Pet. App. at 15a-16a, which *excludes* "willful or wanton" fleeing that "interfere[s] with or

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conclusion when considering the violent subsections of fleeing statutes similar to the first part of the Wisconsin statute (*not* at issue here). *See United States v. Hudson*, 577 F.3d 883, 884-86 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1310 (2010) (finding Missouri's class D vehicular fleeing felony was a crime of violence, which entails "fleeing 'in such a manner that . . . creates a substantial serious risk of serious physical injury or death to any person.'" (quoting Mo. Rev. Stat. § 575.150.5)); *United States v. Harris*, 586 F.3d 1283, 1287-88 (11th Cir. 2009), *petition for cert. filed*, (U.S. May 14, 2010) (No. 09-10868) (finding third subsection of Florida's fleeing statute, which includes driving at "*high speed* or a *wanton disregard for the safety*," was a crime of violence (emphasis in original)).

endanger[s] the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians." Wis. Stat. § 364.04(3). Nonetheless, the Seventh Circuit still found that the nonviolent part of Wisconsin's statute met both the first and second parts of *Begay's* test.

Paying no attention to the elements of the second part of the statute, the Seventh Circuit explained that in the "ordinary case, '[t]aking flight [in a vehicle] calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit.'" Pet. App. at 26a (quoting *United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009)) (alteration in original). As such, the Seventh Circuit held that the second part of the statute was violent and aggressive. *Id.* at 28a. The Seventh Circuit supported its holding with dicta from *Chambers*, in which this Court stated that the "behavior underlying an escape from custody" was likely "more aggressive" and "less passive" than for a failure to report. Pet. App. at 25a (quoting *Chambers*, 129 S. Ct. at 691). The Seventh Circuit concluded that nonviolent vehicular fleeing was more similar to an escape from custody than a failure to report. *Id.* at 26a-27a (citing *Harrimon*, 568 F.3d at 535; *United States v. LaCasse*, 567 F.3d 763, 767 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1311 (2010); *see also United States v. Wise*, 597 F.3d at 1146 ("Either prong of the [Utah] statute requires deliberate action—a far cry from a mere failure to appear at prison.").

The vehicular fleeing statutes at issue in the cases from the Fifth,[8] Sixth,[9] and Tenth[10] Circuits are nearly identical to the one at issue here—none depend on whether the offender flee at a high rate of speed or endanger any person or any thing. Utah's fleeing statute, like Wisconsin's, separates "willful and wanton" fleeing conduct that "interfere[s] with

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[8] The Texas fleeing statute reads in relevant part, "A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him." Tex. Penal Code § 38.04(a) (2004).

[9] The Michigan fleeing-and-eluding statute reads in relevant part as follows:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop, and who willfully fails to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the officer, is guilty of a misdemeanor, and shall be punished by imprisonment for not less than 30 days nor more than 1 year . . . .

Mich. Comp. Laws § 257.602a(1) (1996). In *Young*, the defendant's second offense of the Michigan statute was at issue, which is punishable for up to four years of imprisonment. 580 F.3d at 376.

[10] Pertinent to this petition, the Tenth Circuit examined the second part of Utah's "failing to stop" statute, which reads in relevant part, "[a]n operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not: . . . attempt to flee or elude a peace officer by vehicle or other means." Utah Code § 41-6a-210(1)(a)(ii) (2001).

or endanger[s] the operation of any vehicle or person" from other "attempt[s] to flee or elude." Utah Code § 41-6a-210(1)(a)(i)-(ii) (2001). But similar to the Seventh Circuit, the Tenth Circuit still found that the nonviolent section met *Begay's* test. *See Wise*, 597 F.3d at 1146 ("[I]n *West* we determined that *both* subsections of the Utah failure-to-stop statute are crimes of violence."). The Tenth Circuit stated that a "'deliberate choice by the driver to disobey the police officer's signal . . . poses the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders.'" *West*, 550 F.3d at 964-65 (citation omitted). The Tenth Circuit also found that the conduct underlying the second part of Utah's statute was violent and aggressive. *Wise*, 597 F.3d at 1146.

Similarly, the Fifth Circuit in *Harrimon* found that an "ordinary case" of fleeing under the Texas fleeing statute "poses a serious risk of injury to others." 568 F.3d at 536. In addition, the Fifth Circuit held that a violation of the statute was violent and aggressive, because it "typically involves violent force" which the "arresting officer or officers, [and] also pedestrians and other motorists are subject to." *Id.* at 535. In *Young*, the Sixth Circuit echoed the sentiments of the circuits above, and also did not stick to the elements of the nonviolent fleeing statute before it, finding that the Michigan statue meets both parts of the *Begay* test, because "offenders typically attempt to flee by any means necessary, including speeding, extinguishing lights

at nighttime, driving the wrong way, weaving, etc." 580 F.3d at 378.

The Fifth, Seventh, and Tenth Circuits have acknowledged that circuits have "reached the opposite conclusion." Pet. App. at 28a; *Harrimon*, 568 F.3d at 535; *Wise*, 597 F.3d at 1147. After addressing the conflicting precedent, the Fifth, Seventh, and Eleventh Circuits each reached the same conclusion—that they "have the better of the argument." *E.g.*, Pet. App. at 28a.

C. The Circuit Split On Fleeing Statutes Has Resulted And Will Continue To Result In A Lack of Uniformity In The Law.

Individuals who violate vehicular fleeing statutes may be and many times are in different states and circuits when they are later sentenced as felons in possession of a firearm. Because of this fact, and the split on the issue, circuits and district courts have reached non-uniform interpretations on the issue of whether nonviolent vehicular fleeing satisfies *Begay's* two-part test.

First, under the current state of the law, there is a very high risk that two circuits will reach different outcomes on whether the *same state's* vehicular fleeing statute is a violent felony (or crime of violence). Indeed, this has already happened. In *United States v. Kendrick*, 423 F.3d 803, 809 (8th Cir. 2005), the Eighth Circuit held that conduct underlying Oregon's vehicular fleeing statute constituted a "serious potential risk of injury" and

thus was a crime of violence. In *United States v. Peterson*, the Ninth Circuit held that the *same Oregon statute* was not a crime of violence because it "criminalizes conduct that does not 'present[] a serious risk of physical injury to another." No. 07-30465, 2009 WL 3437834, at *1 (9th Cir. Oct. 27, 2009) (unpublished decision) (citation omitted). Inconsistencies such as this are likely to recur. *See Tyler*, 580 F.3d at 726 (noting disagreement with Sixth Circuit's decision that Michigan fleeing statute section 750.479a was a violent felony).

Second, circuits will stretch either the elements of a state's fleeing statute or their own vehicular fleeing precedent to prevent the appearance of further split on this issue. This too is already happening. To prevent the appearance of a split with the Eleventh Circuit, the Seventh Circuit in this case claimed that the second part of the Wisconsin statute, which is violated by only increasing one's speed or shutting off the vehicle's lights, was analogous to the third subsection of Florida's fleeing statute, which is violated when one flees at a high rate of speed or in "wanton disregard for the safety of persons or property." Pet. App. at 28a n.7 (citation omitted). That analysis is wrong; the two statutes are not analogous. The Florida subsection's elements depend on whether people or property are put at risk, and the Wisconsin statute's elements do not.

Similarly, the Eighth and Eleventh Circuits, attempting to distinguish their cases from those in which circuits have found that nonviolent vehicular fleeing statutes satisfy *Begay*'s test, have contributed

to the confusion. In *Tyler*, the Eighth Circuit compared Minnesota's fleeing statute to fleeing statutes from Utah and Michigan, which the Tenth Circuit and Sixth Circuit, respectively, had found met *Begay's* test. 580 F.3d at 726. The Eighth Circuit distinguished the second, nonviolent part of Utah's fleeing statute because the latter did not define the terms "flee" or "elude." *Id.* Yet in the next sentence, the Eighth Circuit stated that "Michigan's fleeing offense is defined similarly to Minnesota's," even though the Michigan statute *also does not define the terms "flee" or "elude."*

In *Harris*, the Eleventh Circuit analogized the third subsection of the Florida fleeing statute to the nonviolent statutes before the Fifth, Sixth, Seventh, and Tenth Circuits, noting that they all encompass willful fleeing. 586 F.3d at 1289 n.2. The Eleventh Circuit then concluded that "[t]he reasoning is the same in each case: willfully fleeing endangers officers, pedestrians and motorists." *Id.* That conclusion, however, flies in the face of the Eleventh Circuit's holding in *Harrison* that the "willful-fleeing" under the second subsection of Florida's statute was *not* a violent felony. 558 F.3d at 1294-96.

For all of these reasons, Judge Posner is correct, arguing in his dissent in *Welch*, 604 F.3d at 433-35, that the Seventh Circuit precedent that nonviolent fleeing statutes satisfy *Begay's* test, including this case, is questionable. Accordingly, Judge Posner called for this Court to overrule it. *See id.* at 435.

The split and resulting confusion on this issue is well developed and likely to lead to more irreconcilable and non-uniform results going forward. This has led to courts inconsistently issuing 15 year mandatory minimum prison sentences, unless this Court resolves the confusion.

Indeed, there is no reason why individuals, like Mr. Dismuke, should have to face a mandatory minimum sentence of 15 years of imprisonment, because they were sentenced in a circuit that has held that nonviolent vehicular fleeing statutes satisfy *Begay's* test and are violent felonies. While at the same time, his counterparts who violated a similar nonviolent fleeing statute, but are sentenced in circuits that have come out the other way, will not receive the ACCA's mandatory minimum sentence. That unfortunate geographic fact will result in individuals like Mr. Dismuke receiving at least five, and likely more, extra years of imprisonment.

II. The Seventh Circuit And The Other Circuits To Reach Similar Conclusions Have Misapplied This Court's ACCA Precedent.

The Seventh Circuit, and the circuits on which it relied, has decided an important federal question in a manner that is at odds with this Court's applicable precedent. Here, the Seventh Circuit properly applied the modified categorical approach and placed Mr. Dismuke in the second, nonviolent part of the Wisconsin vehicular fleeing statute. The Seventh Circuit, however, found that the nonviolent portion of that statute satisfied both parts of the *Begay* test.

In reaching that conclusion, the Seventh Circuit misapplied this Court's precedent in *Begay*, *Taylor*, *James*, and *Chambers*.

The second part of Wisconsin's fleeing statute does not satisfy *Begay's* test. For a crime to meet that test, it "must (1) present a serious potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives; and (2) involve the same or similar kind of 'purposeful, violent, and aggressive' conduct as the enumerated crimes." Pet. App. at 16a-17a. As to the first part of *Begay's* test, the portion of the Wisconsin statute at issue applies when individuals only increase their speed or turn off their vehicle's lights in an attempt to flee. Such conduct is far removed from the necessary degree of risk of physical injury required to be similar to the ACCA's enumerated crimes. In fact, the Wisconsin fleeing statute specifically limits conduct that falls within this part of *Begay's* test to the first portion of the statute, i.e., "willful and wanton" fleeing "as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians." Wis. Stat. § 346.04(3). As such, the Seventh Circuit erred when it found that Mr. Dismuke's fleeing conviction met the first part of *Begay's* test.[11]

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[11] Before the Seventh Circuit, Mr. Dismuke argued that the first part of the *Begay* test was not satisfied by the crime for which he was convicted—that is, the part of the fleeing statute he was convicted under did not require that he place anyone in danger (indeed that behavior is confined to the first part of the statute). Mr. Dismuke noted, however, that the Seventh

The Seventh Circuit also erred when it held that Mr. Dismuke's fleeing conviction satisfied *Begay's* second part. In doing so, the Seventh Circuit ignored the holdings of this Court in *Taylor* and *James*. In *Taylor*, this Court upheld the "categorical" approach, which requires sentencing courts to look "only to the statutory definitions of the prior offenses" to determine if they are violent felonies. 495 U.S. at 600. In *James*, this Court clarified that under the categorical approach a court should focus its "inquiry" on "the conduct encompassed by the elements of the offense, in the ordinary case." 550 U.S. at 208. In accord with *Taylor* and *James*, the Seventh Circuit should have limited its analysis to whether increasing a vehicle's speed or extinguishing its lights in attempt to flee was violent and aggressive conduct. The Seventh Circuit did no such thing, rather it stated that the second part of Wisconsin's statute "calls [for] the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit." Pet. App. at 26a

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Circuit had previously determined that the very same statute did present a serious potential risk of physical injury. (Pet'r's Appellate Br. at 31 (referencing *United States v. Howze*, 343 F.3d 919, 922 (7th Cir. 2003)). The Seventh Circuit characterized that recognition as an "apparent concession"—it was no concession, but rather a simple acknowledgment of the circuit's controlling precedent on the issue. *See* Pet. App. at 17a & n.3 (Seventh Circuit's discussion of the split between circuits on this issue). Mr. Dismuke reiterated his argument in his petition for rehearing *en banc*. (Pet'r's Pet. Rehr'g *En Banc* at 2 (citing *Peterson*, 2009 WL 3437834, at *2 (unpublished decision))).

(quoting *Spells*, 537 F.3d at 752). Based on that parade of horribles, which is the ordinary case for the first part of Wisconsin's fleeing statute, not the second, the Seventh Circuit found that Mr. Dismuke's conviction was violent and aggressive. *Id.* at 28a. That outcome is wrong.

In addition, the Seventh Circuit ignored this Court's *holding* in *Chambers* in deciding Mr. Dismuke's case. In *Chambers*, this Court overruled the precedent of many circuits, including the Seventh, that all escapes involve a serious risk of potential injury. *See* 129 S. Ct. at 691-92. That precedent was a key factor in prior circuit decisions that held that vehicular fleeing statutes were violent felonies. *See, e.g.*, *Spells*, 537 F.3d at 751 (noting that "every escape involves a serious potential risk of physical injury to another" (citation and marks omitted)). But rather than rely on *Chambers'* holding in analyzing subsequent fleeing statutes, the Seventh Circuit, like the circuits it relied on, have turned to *Chambers'* dicta to bolster their prior decisions. In that dicta, this Court stated that the "behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Chambers*, 129 S. Ct. at 691. The Seventh Circuit used that dicta to sidestep the case-by-case analysis of escape statutes that *Chambers* requires. Instead, it simply concluded that Mr. Dismuke's fleeing offense was more like an escape from custody, than a failure to report, and thus a violent felony. *See* Pet. App. at 26a-27a (citing the Fifth and Sixth Circuits' reliance on *Chambers'* dicta).

Certiorari should be granted to correct this misapplication of this Court's precedent on this important issue, which affects not only Mr. Dismuke, but all others similarly situated.

CONCLUSION

This Court should grant certiorari to resolve the deep and entrenched conflict that has arisen among the circuits regarding whether a fleeing statute, which criminalizes nonviolent conduct, is a violent felony under the ACCA.

Respectfully submitted,

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July 19, 2010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-1693
Argued January 6, 2009
Decided January 27, 2010

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ANTHONY DISMUKE,

Defendant-Appellant.

Michelle L. Jacobs, Paul Kanter (argued), Office of the United States Attorney, Milwaukee, WI, *for Plaintiff-Appellee.*

James A. Walrath (argued), Law Offices of James A. Walrath, Milwaukee, WI, *for Defendant-Appellant.*

Before KANNE, WOOD, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*.

Anthony Dismuke was convicted by a jury of being a felon in possession of a firearm and sentenced to a statutorily mandated 15-year prison term based on three prior convictions the district court deemed to be "violent felonies" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). On appeal he challenges both his conviction and his sentence.

Dismuke has a lengthy felony record and was found in possession of two handguns during a search of his home pursuant to a state-issued warrant. He moved to suppress the guns, but the district court denied the motion. On appeal Dismuke reiterates his claim that the guns were inadmissible because the affidavit submitted in support of the warrant application lacked sufficient corroboration of information supplied by a confidential informant. We disagree. Deferring as we must to the decision of the judge who issued the warrant, *see United States v. McIntire*, 516 F.3d 576, 577-78 (7th Cir.2008), we conclude that the affidavit contained enough independent corroboration to support probable cause to search Dismuke's home. And even if it did not, there is no reason to believe that the warrant-issuing judge abandoned his neutrality or that the police did not act in good faith. Accordingly, the guns were properly admitted at trial and Dismuke's conviction is affirmed.

Dismuke also challenges his sentence, arguing that under the Supreme Court's decision in *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), his Wisconsin felony conviction for vehicular fleeing is not a "violent felony" under the ACCA and therefore should not have counted toward the three convictions necessary to subject him to the 15-year mandatory minimum sentence. We disagree with this contention as well. Applying *Begay* and reading our early post-*Begay* decision in *United States v. Spells*, 537 F.3d 743 (7th Cir.2008), in light of the Supreme Court's later decision in *Chambers v. United States*, — U.S. —, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009), we conclude that Wisconsin's vehicular-fleeing offense qualifies as a violent felony under the ACCA.

I. Background

On January 28, 2007, Milwaukee Police Officer Anthony Randazzo applied for a warrant to search the home of Anthony Dismuke for evidence of illegal firearms possession. The affidavit Randazzo submitted in support of the application relied primarily on information the officer had received from a confidential informant. The affidavit, however, provided no information about the informant other than the officer's assertion that he was "reliable."

Randazzo began his affidavit with the customary explanation of his law-enforcement experience: He was a 15-year veteran of the Milwaukee Police Department and had extensive training and experience working on firearms investigations and with confidential informants. He then related the

following information about Dismuke: On January 27, 2007, Randazzo was contacted by a "reliable" confidential informant who reported that Dismuke, a felon, was in possession of "at least three firearms." More specifically, the informant told Randazzo that Dismuke lived at 2528 W. Locust Street in Milwaukee and that within the last week, the informant had seen Dismuke at his Locust Street home in possession of a shotgun and two handguns. Randazzo asked the informant if he could identify Dismuke from a photograph and the informant did so. Randazzo also verified that the informant could distinguish between different types of firearms.

Randazzo then consulted court records and confirmed that Dismuke had prior felony convictions; the affidavit listed the offenses, case numbers, and dates of several of the convictions. Randazzo also checked the Wisconsin Department of Transportation driver's license database, which confirmed that Dismuke lived at the address provided by the informant. Randazzo then went to the Locust Street residence and located an automobile registered to Dismuke parked behind the house. Finally, the affidavit provided a description of the house, explained the need to keep the informant's identity confidential, and requested no-knock authorization.

A Milwaukee County Court Commissioner reviewed Randazzo's affidavit that same day, found probable cause, and issued a warrant to search Dismuke's home for evidence of unlawful possession of firearms. Officers executed the warrant the next day and recovered two handguns, ammunition, and documents identifying the resi-

dence as Dismuke's. The case was referred to federal authorities, and Dismuke was indicted for possessing firearms as a convicted felon in violation of 18 U.S.C. § 922(g)(1). He moved to suppress the evidence from the search, arguing that Randazzo's affidavit was insufficient to support probable cause. The district court denied the motion. The court concluded first that there was probable cause to support the issuance of the warrant, and in the alternative, the search was saved by the good-faith exception articulated in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Dismuke was convicted following a jury trial, and his presentence report ("PSR") recommended that he be sentenced as an armed career criminal, *see* 18 U.S.C. § 924(e), based on three Wisconsin convictions that qualified as "violent felonies" under the ACCA. The three convictions were: (1) armed robbery; (2) burglary; and (3) vehicular fleeing from an officer. Dismuke objected to the PSR's conclusion that his conviction for fleeing was a violent felony. The district court adopted the PSR's recommendation, found that Dismuke had three violent-felony convictions, and imposed the ACCA's mandatory minimum sentence of 15 years.

II. Discussion

A. Search Warrant

Dismuke first challenges the district court's denial of his suppression motion. He argues that Randazzo's affidavit provided too little corroboration of the information from the confidential

informant and was therefore insufficient to establish probable cause to search his home. Because Dismuke contests the sufficiency of the warrant affidavit, the question for us is not whether the district court got the probable-cause question right but whether the warrant-issuing judge did. "On *that* issue we must afford great deference to the issuing judge's conclusion." *McIntire*, 516 F.3d at 578 (internal quotation marks omitted). We will uphold a finding of probable cause to search "so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) (alteration in original)).

Probable cause is a common-sense, nontechnical inquiry, and an affidavit submitted in support of a search-warrant application will be sufficient to support a probable-cause finding if, "based on the totality of the circumstances, the affidavit sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." *United States v. Peck*, 317 F.3d 754, 756 (7th Cir.2003). Even if we conclude that the affidavit is insufficient to establish probable cause, the evidence obtained in the execution of the warrant need not be suppressed if the police relied on the warrant in good faith. *See Leon*, 468 U.S. at 920-21, 104 S.Ct. 3405. An officer's decision to seek a warrant is prima facie evidence that the officer was acting in good faith. *United States v. Watts*, 535 F.3d 650, 657 (7th

Cir.2008). The good-faith exception thus applies unless the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" or the warrant-issuing judge "wholly abandoned" his neutral judicial role and "serve[d] merely as a rubber stamp for the police." *Leon*, 468 U.S. at 923, 104 S.Ct. 3405.

Where, as here, the affidavit submitted in support of a search warrant relies on information supplied by an informant, the totality-of-the-circumstances inquiry generally focuses on the informant's reliability, veracity, and basis of knowledge. *See United States v. Olson*, 408 F.3d 366, 370 (7th Cir.2005). Several factors inform the analysis, including: (1) the degree of police corroboration of the informant's information; (2) the extent to which the information is based on the informant's personal observations; (3) the amount of detail provided by the informant; (4) the interval of time between the events reported by the informant and the warrant application; and (5) whether the informant personally appeared before the warrant-issuing judge to present the affidavit or testimony. *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir.2002). "[A] deficiency in one factor may be compensated for by a strong showing in another or by some other indication of reliability." *United States v. Brack*, 188 F.3d 748, 756 (7th Cir.1999) (citing *Gates*, 462 U.S. at 233, 103 S.Ct. 2317).

A complication here is that Randazzo's affidavit described the confidential informant as "reliable" without offering any explanation for that asser-

tion. We have held that a wholly conclusory statement about an informant's reliability is entitled to no weight; "information obtained from a reliable source must be treated as information obtained from an informant of unknown reliability." *Koerth*, 312 F.3d at 867 (internal quotation marks omitted). But an informant's "unknown reliability" is not necessarily fatal to the probable-cause determination; there may be a sufficient basis to sustain the probable-cause finding under the totality of the circumstances. *See Gates*, 462 U.S. at 237-38, 103 S.Ct. 2317. "Statements from an informant of unknown reliability may in certain instances serve to establish probable cause if, under the totality of the circumstances, a reasonable person might consider that the statements are worthy of credence." *Koerth*, 312 F.3d at 867-68 (citing *Gates*, 462 U.S. at 238, 103 S.Ct. 2317). In this situation, the extent to which the police have corroborated the informant's information—always an important factor—is key. *Id.* at 868.

We see this as a close case. Randazzo's affidavit establishes that the informant's information was current and based on personal observation, but the level of detail and corroboration are not well-developed. The informant told Randazzo that he had personally and recently seen Dismuke in possession of three guns in his home; he provided an exact address; and he described the guns as a shotgun and two pistols. These basic details provide at least *some* indicia of reliability. But the affidavit gave the warrant-issuing court commissioner no additional particularized facts about the informant's observations. For instance, it offered

no explanation about the circumstances surrounding the informant's observations-no explanation, for example, of how the informant knew Dismuke, why he was with Dismuke at his residence, or where the guns were in the house.

Randazzo did make some effort to corroborate the informant's information. He asked the informant to identify Dismuke from a photograph, and the informant correctly did so. He confirmed that the informant knew the difference between semiautomatic weapons, revolvers, rifles, and shotguns. He confirmed through driver's license records that the address the informant had provided was indeed Dismuke's. And when he went to the house and saw a car parked in the rear, he traced the plate and confirmed that the car listed to Dismuke. He also confirmed through court records that Dismuke was a convicted felon.

Confirming the informant's basic knowledge of firearms made the information he provided marginally more reliable. But Randazzo's other efforts corroborated only Dismuke's identity and the fact that the informant had correctly identified Dismuke's residence. Accuracy on these innocent facts is important but does not directly bolster the informant's claim that Dismuke illegally possessed guns at his home. Still, considering the circumstances in their totality and giving "great deference" to the court commissioner who issued the warrant, we conclude that Randazzo's affidavit was sufficient to support the probable-cause finding.

The totality of the circumstances before the commissioner included the fact that the informant had contacted Randazzo and reported that he per-

sonally observed Dismuke at his home in possession of three specific firearms—a shotgun and two pistols—within the last week. The informant was able to distinguish between different types of firearms and correctly identified Dismuke's photo. The address he said was Dismuke's checked out. Although Randazzo did not identify the informant or bring him before the court commissioner for live testimony, the informant did subject himself to prosecution for making false statements to law enforcement by coming to Randazzo with information about Dismuke. In all, we think the affidavit is sufficient, albeit just barely, to sustain the court commissioner's issuance of the search warrant.

In any event, under the good-faith exception, the suppression of the fruits of the search would not be appropriate in a close case like this one. This is not a case where the probable-cause determination rested on little more than a "bare-bones" affidavit or entirely conclusory allegations. *See United States v. Curry*, 538 F.3d 718, 729 (7th Cir.2008). Even if we were to conclude that the affidavit was insufficient to establish probable cause, we could not say that it was "so plainly deficient that any reasonably well-trained officer 'would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.' " *Koerth*, 312 F.3d at 869 (quoting *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)); *see also Watts*, 535 F.3d at 657. Nor is there any evidence to suggest that the warrant-issuing court commissioner abandoned his neutral judicial role.

Accordingly, we affirm Dismuke's conviction for possession of a firearm by a felon.[1]

B. Fleeing as a "Violent Felony" after *Begay v. United States*

Dismuke also challenges the district court's decision to classify his Wisconsin conviction for vehicular fleeing an officer as a violent felony under the ACCA. This conviction, when added to his two other violent-felony convictions (for armed robbery and burglary), mandated a minimum 15-year sentence. *See* 18 U.S.C. § 924(e)(1).

1. General Principles

The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is bur-

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[1] Dismuke also argues he was entitled to a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). This requires a "substantial preliminary showing" that (1) the affidavit contained materially inaccurate information; and (2) the police knew the information in the affidavit was false or acted in reckless disregard of its truth. *United States v. Amerson*, 185 F.3d 676, 688 (7th Cir.1999). Dismuke has not come close to making this showing. He has not identified any materially inaccurate or false information in the affidavit. Rather, he argues only that his address listed in the state driver's license records was five years old and the automobile registration on the car behind his home had expired. This is not enough to suggest that the address the informant gave Randazzo was inaccurate or that Randazzo acted in reckless disregard for its accuracy.

glary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Wisconsin's fleeing offense is punishable by a prison term of more than one year, *see* WIS. STAT. §§ 346.04(3), 346.17(3), 939.50(3), but it does not have as an element the "use, attempted use, or threatened use of physical force" and therefore does not qualify under subsection (i) of the violent-felony definition. This leaves subsection (ii) of the definition—the "residual clause"—which includes any crime that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

The Supreme Court has directed us to use a "categorical approach" to determine whether a crime is a violent felony under the ACCA's residual clause. *See, e.g., United States v. Woods*, 576 F.3d 400, 403-05 (7th Cir.2009). The categorical approach requires that we "look only to the fact of conviction and the statutory definition of the prior offense" rather than the "particular facts disclosed by the record of conviction." *Shepard v. United States*, 544 U.S. 13, 17, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (internal quotation marks omitted); *see also Woods*, 576 F.3d at 403. But when the statute in question is divisible—that is, when it describes multiple offense categories, some of which would be crimes of violence and some of which would not—the Court has fashioned a modified categorical approach. *Woods*, 576 F.3d at 404. Under the modified categorical approach,

" 'we may expand our inquiry into a *limited* range of additional material . . . in order to determine whether the jury actually *convicted* the defendant of (or, in the case of a guilty plea, the defendant expressly admitted to) violating a portion of the statute that constitutes a violent felony.' " *Id.* (quoting *United States v. Smith*, 544 F.3d 781, 786 (7th Cir.2008)).

The expanded inquiry is limited to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254; *see also Smith*, 544 F.3d at 786. This modified categorical approach does not, however, inquire into the factual specifics of the defendant's conduct; the point of the expanded inquiry is not to consider what the defendant in fact did but to determine which category of crime the defendant committed. *See Woods*, 576 F.3d at 405-06.

2. *The Supreme Court's Decision in* Begay

Dismuke argues that his fleeing conviction cannot be classified as a violent felony after the Supreme Court's decision in *Begay*, which was released about a month after he was sentenced.[2] *Begay* addressed the scope of the ACCA's residual clause and interpreted it in a way that narrows its reach. The predicate ACCA conviction at issue in

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[2] *Begay* applies here because it was decided while this case was pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

Begay was a New Mexico felony conviction for recidivist drunk driving. The Supreme Court assumed that the lower courts were correct in concluding that drunk driving involved conduct that "presents a serious potential risk of physical injury to another" within the meaning of statute. *Begay*, 128 S.Ct. at 1584. The Court focused instead on the statute's list of specifically included crimes—burglary, arson, extortion, and crimes involving the use of explosives—and concluded that the residual clause "covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Id.* at 1585. In other words, the clause covers only "crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id.* The Court said the presence of the word "otherwise" after the list of included crimes did not undermine this limiting construction because "otherwise" could "refer to a crime that is similar to the listed examples in some respects but different in others—similar, say, in respect to the degree of risk it produces, but different in respect to the way or manner in which it produces that risk." *Id.* at 1586 (internal quotation marks omitted).

The Court also held that a predicate crime will be "similar in kind" to the enumerated crimes if it involves the same sort of "purposeful, violent, and aggressive" conduct as the enumerated crimes. *Id.* at 1586-87. Because drunk driving is a strict-liability crime, the Court concluded it was "too unlike" the example crimes to be covered by the residual clause of the definition. *Id.* at 1584, 1586-87. Accordingly, the Court held that New Mexico's

drunk-driving felony did not qualify as a violent felony under the ACCA. *Id.* at 1588.

3. Wisconsin's Fleeing Offense as a Violent Felony under Begay

We have previously determined that Wisconsin's vehicular-fleeing offense qualifies as a violent felony under the residual clause. *See United States v. Howze*, 343 F.3d 919, 921-22 (7th Cir.2003). *Begay*'s alteration of the framework for deciding residual-clause cases requires us to reconsider the matter. We start, as the categorical approach requires, with the statutory definition of the crime:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

WIS. STAT. § 346.04(3) (2000).

This statute is divisible in the sense that brings the modified categorical approach into play—that is, it defines more than one category of vehicular fleeing. *See Woods*, 576 F.3d at 411. The first category is fleeing or attempting to elude an officer "by willful or wanton disregard of [the officer's] signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer

or other vehicles or pedestrians." WIS. STAT. § 346.04(3). The second is "increas[ing] the speed of the operator's vehicle or extinguish[ing] the lights of the vehicle in an attempt to elude or flee." *Id.*

Because the statute is divisible, we may consult the charging document or other comparable judicial record from the underlying case to determine the specific crime Dismuke committed. *See Woods*, 576 F.3d at 405-06; *Smith*, 544 F.3d at 786. The criminal complaint reflects that Dismuke was charged with committing the second variety of fleeing an officer. The complaint alleged that on March 3, 1998, Dismuke was the operator of a vehicle and "after having received a visual and audible signal from a marked police vehicle, did increase the speed of his vehicle in an attempt to flee, contrary to Wisconsin Statutes Section[ ] 346.04(3)."

As we have explained, to qualify as a violent felony under the residual clause after *Begay*, this crime must "involve conduct that presents a serious potential risk of physical injury to another" and must also be "roughly similar, in kind as well as in degree of risk posed, to the example [ ]" crimes of burglary, arson, extortion, or use of explosives. *Begay*, 128 S.Ct. at 1584-85. The "similar in kind" aspect of this inquiry asks whether the predicate crime encompasses conduct that is similarly "purposeful, violent, and aggressive" to the example crimes. To put it more succinctly, after *Begay*, a residual-clause predicate crime must (1) present a serious potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes

involving the use of explosives; and (2) involve the same or similar kind of "purposeful, violent, and aggressive" conduct as the enumerated crimes.

Dismuke does not contend that Wisconsin's fleeing offense fails the first part of this inquiry. He apparently concedes that the offense involves conduct that presents a serious potential risk of physical injury and is sufficiently similar to the residual clause's enumerated crimes in respect to the "degree of risk posed" to satisfy this part of the *Begay* framework.[3] He argues instead that

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[3] Dismuke's concession is understandable. As we have noted, before *Begay* we held that Wisconsin's fleeing crime is a violent felony under the residual clause and in so doing concluded that the offense involves conduct that presents a serious potential risk of physical injury to another. *Howze*, 343 F.3d at 921-22. Nothing in *Begay* undermines this conclusion. *Begay*'s additional requirement is that the potential risk be similar in degree to the residual clause's enumerated crimes. The Supreme Court has noted that the potential risk associated with the first enumerated crime, burglary, "arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party." *James v. United States*, 550 U.S. 192, 203, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (holding that attempted burglary is a violent felony under the residual clause).

As other circuits have noted, vehicular fleeing involves active defiance of a law-enforcement officer, initiates a pursuit, and typically culminates in a face-to-face confrontation between the officer and the suspect. *See United States v. Young*, 580 F.3d 373, 377-78 (6th Cir.2009); *United States v. Harrimon*, 568 F.3d 531, 536 (5th Cir.2009); *United States v. West*, 550 F.3d 952, 969-71 (10th Cir.2008). The Fifth Circuit has also noted that the rate of injury from vehicular fleeing exceeds the rate of injury from arson, another of the residual clause's enumerated crimes. *Harrimon*, 568 F.3d at

Wisconsin's fleeing offense is not "similar in kind" to the enumerated crimes because it is not similarly "purposeful, violent, and aggressive." The government responds by invoking *United States v. Spells*, 537 F.3d 743, 751-53 (7th Cir.2008), an early post-*Begay* decision that classified Indiana's fleeing offense as a violent felony under the residual clause. Wisconsin's fleeing offense is narrower than Indiana's,[4] so it is tempting to simply accept

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537. Although there is some contrary authority, *see United States v. Tyler*, 580 F.3d 722, 725 (8th Cir.2009); *United States v. Harrison*, 558 F.3d 1280, 1294 (11th Cir.2009), we agree with the Fifth, Sixth, and Tenth Circuits that vehicular fleeing presents a potential risk of physical injury similar in degree to the residual clause's enumerated offenses.

In this regard, we think it important to note that one of the two circuits that have held vehicular fleeing is *not* a violent felony after *Begay* addressed a statute defining the offense as flight alone, without any additional requirement of an acceleration in speed, the extinguishment of lights, or any other aggravator. *See Harrison*, 558 F.3d at 1290. The Eleventh Circuit in *Harrison* made it clear that the absence of any requirement of increased speed or reckless driving was important to its assessment of the risk question. *Id.* at 1294 ("[T]he fact that the behavior underlying Florida's willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on—but without high speed or recklessness—makes it unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer."). Wisconsin's fleeing statute requires flight by accelerated speed or extinguishment of vehicle lights in an attempt to elude the officer. We think this offense is sufficiently similar in degree of potential risk to the residual clause's enumerated crimes and therefore satisfies this aspect of *Begay*.

[4] As we have noted, Wisconsin's fleeing statute prohibits two specific types of vehicular fleeing: willful and wanton disregard of the officer's signal in a manner that

the government's argument and rely on *Spells* as subsuming the question presented here. But in light of an analytical omission we have noted in *Spells* and intervening developments in the caselaw, we think the issue calls for independent consideration.

The first requirement of *Begay*'s "similarity in kind" equation—that the predicate offense be categorically "purposeful"—is easily satisfied here. In *Woods* we held that *Begay*'s "purposeful" requirement focuses on the *mens rea* element of the predicate crime: "[T]he residual clause encompasses only purposeful crimes; crimes with the *mens rea* of recklessness do not fall within its scope." 576 F.3d at 412-13.

Wisconsin's vehicular-fleeing offense is a purposeful crime. Section 346.04(3) provides: "No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall *knowingly* flee or attempt to elude" the officer. (Emphasis added.) After this prefatory clause, the statute specifies two alternative modes of fleeing: (1) by "willful or wanton disregard" of the officer's signal "so as to interfere with or endanger" the officer, other vehicles, or pedestrians; and (2) by "increas[ing] the

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endangers others, and increasing the speed or extinguishing the lights of the vehicle in an attempt to elude or flee. *See* WIS. STAT. § 346.04(3). The Indiana fleeing statute at issue in *Spells* more broadly prohibited the use of a vehicle to "flee[ ] from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop." 537 F.3d at 749.

shortly after *Begay*, we addressed Indiana's fleeing statute, which "criminalizes using a vehicle to 'knowingly or intentionally . . . flee[ ] from a law enforcement officer.' " 537 F.3d at 752. We summarily held that this "knowingly and intentionally" element satisfied *Begay*'s requirement of "purposeful" conduct. *Id.* at 752-53. Other circuits have addressed fleeing statutes with similar *mens rea* requirements and are uniformly in accord.[5] *See, e.g., United States v. Young*, 580 F.3d 373, 377 (6th Cir.2009) (holding that the Michigan fleeing statute's requirement of "willful" failure to stop "clearly involved" purposeful conduct); *United States v. LaCasse*, 567 F.3d 763, 766 (6th Cir.2009) (same holding regarding a different subsection of Michigan's fleeing statute); *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir.2009) (Minnesota's fleeing statute requires "intent to elude" and is therefore "purposeful" under *Begay*, but is not categorically "violent and aggressive"); *United States v. Harrimon*, 568 F.3d 531, 534 (5th Cir.2009) (considering Texas's fleeing statute and noting "unlike the DUI statute at issue in *Begay*, fleeing by vehicle requires intentional conduct"); *United States v. Harrison*, 558 F.3d 1280, 1295 (11th Cir.2009) (concluding that the Florida statute's requirement of "willful" fleeing satisfied *Begay*'s purposeful requirement but the crime was

[5] In *United States v. Roseboro*, 551 F.3d 226 (4th Cir.2009), the Fourth Circuit considered whether South Carolina's fleeing offense was a violent felony under the residual clause as interpreted in *Begay*. The court noted that in contrast to fleeing statutes in most other states, the South Carolina statute did not require knowing or intentional disregard of an officer's signal. *Id.* at 235, 236 n. 5.

not sufficiently "violent and aggressive"); *United States v. West*, 550 F.3d 952, 970-71 (10th Cir.2008) (holding that the Utah fleeing statute's requirement of "willfulness" satisfies *Begay*'s "purposeful" requirement).

The circuits are divided, however, on whether vehicular fleeing satisfies *Begay*'s requirement that the predicate crime involve conduct that is similarly "violent and aggressive" as the residual clause's enumerated crimes. The Fifth, Sixth, and Tenth Circuits have held that fleeing satisfies *Begay*'s "violent and aggressive" requirement. *See Harrimon*, 568 F.3d at 534-35; *Young*, 580 F.3d at 377-78; *LaCasse*, 567 F.3d at 767; *West*, 550 F.3d at 969-70.[6] The Eighth and Eleventh Circuits have come to the opposite conclusion. *See Tyler*, 580 F.3d at 725-26; *Harrison*, 558 F.3d at 1295-96.

Spells preceded these opinions; ours was the first circuit to address whether vehicular fleeing qualifies as a violent felony after *Begay*. *Spells* held that Indiana's fleeing offense is not only "purposeful" but is also categorically "aggressive" and on this basis held that it satisfied the *Begay* framework. 537 F.3d at 752. Our decision in Spells, however, did not address whether fleeing is "violent" in the way required by *Begay*. We do so here and hold that Wisconsin's crime of vehicular fleeing involves conduct that is similarly "violent

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[6] *West* contained a lengthy discussion analogizing fleeing to escape. Any suggestion in that discussion that *all* escape crimes—including failure to report—are violent felonies was withdrawn by *United States v. Shipp*, 589 F.3d 1084, 1090 n. 3 (10th Cir.2009), in light of *Chambers*, — U.S. —, 129 S.Ct. 687, 172 L.Ed.2d 484. This does not alter *West*'s holding regarding vehicular fleeing.

and aggressive" to burglary, arson, extortion, or crimes that involve the use of explosives.

First, it bears emphasizing that the Supreme Court's categorical approach focuses on the generic crime as ordinarily committed; it is not necessary, therefore, that every conceivable violation of the statute meet the *Begay* test. *See James v. United States*, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); *see also Woods*, 576 F.3d at 404. Instead, the proper inquiry is whether the conduct encompassed by the statutory elements of the crime, in the ordinary or typical case, presents a serious potential risk of physical injury and (as *Begay* requires) bears sufficient similarity—both in kind and degree of risk posed—to the conduct encompassed by the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives. *See Woods*, 576 F.3d at 404. If the conduct encompassed by Wisconsin's fleeing statute is "violent and aggressive" in this generic sense, then the requirements of *Begay* are satisfied and the conviction was properly counted as a violent felony.

The fleeing offense at issue here makes it a crime for the driver of a vehicle to knowingly disregard a police signal and take flight by accelerating his speed or extinguishing the lights of his vehicle in an attempt to flee or elude the pursuing officer. For reasons we will explain, we think this conduct is violent and aggressive in the sense required by *Begay*. Dismuke's argument to the contrary relies largely on this statement from *Begay*: "By way of contrast, statutes that forbid driving under the influence, such as the statute

before us, typically do not *insist on* purposeful, violent, and aggressive conduct. . . ." 128 S.Ct. at 1586 (emphasis added). He urges us to take the Supreme Court's use of the phrase "insist on" quite literally—that is, as limiting the residual clause to crimes that *require* or "insist on" a violent act. This strikes us as an overreading of this singular sentence and a misreading of the opinion as a whole.

The crimes enumerated in the residual clause are violent and aggressive not because they invariably involve acts of violence but because they are characterized by aggressive conduct that carries the genuine potential for violence and thus physical injury to another. Unlike *Begay*'s "purposeful" requirement, which focuses on the *mens rea* element of the predicate crime, *see Woods*, 576 F.3d at 408, *Begay*'s "violent and aggressive" requirement is a descriptive phrase and focuses on the character of the conduct encompassed by the elements of the crime, not the elements themselves.

The Supreme Court observed in *Begay* that the enumerated crimes in the residual clause typically involve "violent and aggressive" conduct and therefore limited the reach of the clause to like crimes. None of the enumerated crimes, however, *requires* an act of violence. Burglary doesn't require an act of violence; neither does extortion or arson. Perhaps crimes involving the use of explosives could be said to require an act of violence in that an explosion is inherently violent. Even so, we do not read the *Begay* "insists on" language in the strictly literal sense that Dismuke suggests. We conclude instead that the "violent

and aggressive" limitation requires only that a residual-clause predicate crime be characterized by aggressive conduct with a similar potential for violence and therefore injury as the enumerated offenses, not that it must "insist on" or require a violent act.

The Supreme Court's decision in *Chambers v. United States*, — U.S. —, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009), confirms this understanding of how to apply *Begay*'s "violent and aggressive" requirement. The predicate conviction in *Chambers* was the version of Illinois' escape crime that consists of a failure to report for custody. The Court distinguished the failure-to-report version of this offense from one that involved an actual escape from physical custody. "The behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Id.* at 691. The Court continued: "Conceptually speaking, the crime amounts to a form of inaction, a far cry from the 'purposeful, violent, and aggressive conduct' *potentially at issue* when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." *Id.* at 692 (quoting *Begay*, 128 S.Ct. at 1586) (emphasis added). The Court concluded that a conviction for failure to report for custody was not a violent felony under the residual clause. *Id.* at 693.

Chambers is relevant here in two respects. First, as a general matter, *Chambers* confirms that the required comparison between the predicate and enumerated crimes tests whether the

predicate crime is characterized by aggressive conduct with a similar potential for violence as the enumerated offenses. And second, more specifically to the point here, *Chambers* implies that unlike a failure to report, which does not have these characteristics, an escape from physical custody would meet this test.

Our decision in *Spells* was issued before *Chambers*, but we noted there that in the ordinary case, "[t]aking flight [in a vehicle] calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit." *Spells*, 537 F.3d at 752. In *West*, also decided before *Chambers*, the Tenth Circuit elaborated on this point:

> [T]he offense of failing to stop at the command of a police officer will typically lead to a confrontation with the officer being disobeyed. It is likely to lead, in the ordinary case, to a chase or at least an effort by police to apprehend the perpetrator. All of these circumstances increase the likelihood of serious harm to the officers involved as well as any bystanders that by happenstance get in the way of a fleeing perpetrator or his pursuers. For these reasons, we conclude that the crime of failing to stop at an officer's command is, in the ordinary case, an offense involving violent and aggressive behavior.

550 F.3d at 970.

The Fifth Circuit's decision in *Harrimon* had the benefit of both *Begay* and *Chambers*, and the court drew the same implication from *Chambers* as we

do here. "Th[e] active defiance of an attempted stop or arrest is similar to the behavior underlying an escape from custody, which, as the Supreme Court noted in *Chambers*, is 'less passive' and 'more aggressive' than that likely underlying failure to report." *Harrimon*, 568 F.3d at 535. The court noted that "[f]leeing by vehicle requires disregarding an officer's lawful order, which is a clear challenge to the officer's authority and typically initiates pursuit." *Id.* The court continued: "[F]leeing by vehicle 'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of violence." *Id.* (quoting *West*, 550 F.3d at 970). On this reasoning the court concluded that the Texas crime of fleeing by vehicle satisfied *Begay*'s "violent and aggressive" requirement and qualified as a violent felony under the definition's residual clause. *Id.*

Likewise, the Sixth Circuit relied on the discussion of escape in *Chambers* to conclude that Michigan's fleeing statute satisfies the requirements of *Begay*. *See LaCasse*, 567 F.3d at 767. The court observed:

> What is fleeing and eluding but an attempt to escape? It is certainly not a form of inaction and, for that reason, we read *Chambers* to stand, albeit tacitly, for the proposition that an attempt to escape from law enforcement officials may represent a "violent felony" under the ACCA because it includes aggressive conduct. . . .

Id.

Although, as we have noted, the Eighth and the Eleventh Circuits have reached the opposite conclusion, *see Tyler*, 580 F.3d at 725-26; *Harrison*, 558 F.3d at 1295-96, we think our colleagues in the Fifth, Sixth, and Tenth Circuits have the better of the argument.[7] Accordingly, we hold that Wisconsin's vehicular-fleeing crime satisfies *Begay*'s "violent and aggressive" requirement. Dismuke's fleeing conviction was therefore properly classified as a violent felony for purposes of the ACCA. His resulting 15-year sentence, the mandatory minimum under the ACCA, was statutorily required.

AFFIRMED.

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[7] It is important to note again, *see supra* note 3, that the Florida statute before the Eleventh Circuit in *Harrison* was broader than the Wisconsin statute at issue here. The particular subsection of the Florida statute at issue in *Harrison* was the base offense of willful fleeing or attempting to elude; a separate section of the statute, not at issue in *Harrison*, covered fleeing by accelerated speed or by "wanton disregard for the safety of persons or property." 558 F.3d at 1290. In holding that the base offense of willful fleeing was not a violent felony, the Eleventh Circuit distinguished the version of the crime that entailed fleeing at high speed or with wanton disregard for safety: "Of course, our conclusion would be different were the statute to criminalize conduct that, in the ordinary case, involves an offender stepping on the gas and driving away recklessly without regard for the safety of others." *Id.* at 1295. Thus, our conclusion here regarding the Wisconsin statute—which requires fleeing by accelerated speed or extinguished vehicle lights—actually parts company with just one circuit, the Eighth, in *Tyler*, 580 F.3d at 726.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT WISCONSIN

No. 07-CR-81
March 13, 2008

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

ANTHONY DISMUKE,

Defendant.

Tracy M. Johnson, United States Department of Justice (Ed-Wi) Office of the U.S. Attorney, Milwaukee, WI, *for Plaintiff.*

SENTENCING MEMORANDUM

LYNN ADELMAN, *District Judge.*

A jury convicted defendant Anthony Dismuke of possessing firearms as a felon, 18 U.S.C. § 922(g), and I set the case for sentencing. In imposing sentence, the district court must first calculate the

guideline range, then select an appropriate sentence under all of the factors set forth in 18 U.S.C. § 3553(a). *United States v. Holt*, 486 F.3d 997, 1004 (7th Cir.2007). In this case, the pre-sentence report ("PSR") concluded that defendant qualified as an armed career criminal under 18 U.S.C. § 924(e), therefore subject a 15 year mandatory minimum. Defendant objected, but I concluded that the report accurately designated him an armed career criminal. I then imposed a sentence of 15 years' imprisonment.

I. GUIDELINE-ACCA CALCULATION

Generally, the offense of felon in possession carries a maximum sentence of 10 years imprisonment. 18 U.S.C. § 924(a)(2). However, under the Armed Career Criminal Act ("ACCA), if the defendant has three or more prior convictions for a "violent felony" or "serious drug offense" he is subject to a sentence of 15 years to life. 18 U.S.C. § 924(e). In the present case, the PSR designated defendant an armed career criminal based on three Wisconsin convictions: (1) burglary in 1985, (2) armed robbery in 1985 and (3) fleeing in 1998. (PSR ¶ 19.)[1] Of these three potential predicate offenses, defendant challenged only the fleeing conviction. He did in his objections also seek to exclude as possible predicates other convictions based on their age, restoration of his civil rights under

[1] The report also referenced a possession of marijuana with intent to deliver conviction, but this conviction did not carry a maximum term of imprisonment of 10 years or more, so it did not qualify under § 924(e)(2)(A).

§ 921(a)(20), and/or lack of proof that he was represented by counsel. However, because I concluded that defendant's more recent Wisconsin convictions sufficed, I did not address these other arguments under Fed.R.Crim.P. 32(i)(3).

First, the parties agreed that defendant's 1985 burglary and armed robbery convictions qualified as violent felonies under § 924(e)(2)(B). These two convictions did not score criminal history points under the sentencing guidelines, but there is no similar time limit under § 924(e). *See United States v. Wright*, 48 F.3d 254, 255-56 (7th Cir.1995) (holding that the ACCA "does not place any time restrictions on the felonies" and declining to adopt the temporal limits contained in the guidelines or Fed.R.Evid. 609(b)).

Second, I found that defendant's 1998 fleeing conviction also qualified. In *United States v. Howze*, 343 F.3d 919, 921-22 (7th Cir.2003), the court of appeals held that fleeing under Wisconsin law is a violent felony under the ACCA. The court noted that such conduct always creates a serious potential risk of physical injury to another. *See also United States v. Rosas*, 410 F.3d 332 (7th Cir.2005) (holding that fleeing is a crime of violence under the career offender guideline).

Defendant attempted to distinguish *Howze* on the grounds that the state complaint charged him with "attempted eluding." However, the judgment lists the conviction as "Vehicle Operator Flee/Elude Officer." In any event, Wis. Stat. § 346.04(3) does not create two different offenses, one complete and the other inchoate. Rather, as the *Howze* court noted, the statute makes it a crime to "'knowingly flee or attempt to elude any traffic

officer.'" 343 F.3d at 921 (quoting Wis. Stat. § 346.04(3)). Further, as the government noted, defendant's conviction could be considered "attempted" eluding only because the police caught him. It would make little sense to have classification of this offense turn on whether the defendant was ultimately successful in getting away; the risk of injury is the same regardless of the outcome of the chase. *Cf. James v. United States*, 127 S.Ct. 1586, 1591 (2007) ("We conclude that nothing in the plain language of clause (ii), when read together with the rest of the statute, prohibits attempt offenses from qualifying as ACCA predicates when they involve conduct that presents a serious potential risk of physical injury to another.").

Defendant cited legislative history materials on the nature of the risk created by this crime. It is true that the Wisconsin legislature recently created a misdemeanor version of the crime under Wis. Stat. § 346.04,[2] in recognition of the fact that some offenses did not warrant felony treatment. However, defendant was convicted of a felony violation of § 346.04(3), such offense conduct remains a felony today, and I am bound by the Seventh Circuit's characterization of that offense.

Defendant also noted that there need not be any pursuit by the officer in a fleeing case, meaning

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[2] Specifically, § 346.04(2t) provides: "No operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits." This offense is a class A misdemeanor. Wis. Stat. § 346.17(2t).

that the offense can be committed under circumstances that do not pose a serious risk. However, the Seventh Circuit has held that the ACCA is concerned with "an assessment of risk rather than actual outcomes," *Howze,* 343 F.3d at 922, and the court of appeals has concluded that a violation of § 346.04(3) presents such a risk under a categorical approach. *See also United States v. Golden,* 466 F.3d 612, 614 (7th Cir.2006) (stating that the benchmark should be the possibility of violence, not whether one can postulate a non-confrontational hypothetical scenario).

Defendant cited *United States v. Sparks,* 87 F.3d 276 (9th Cir .1996), but that case concerned a Nevada statute prohibiting "invasion of the home," a crime the Ninth Circuit found created some risk of injury, but "not enough of a risk." The Seventh Circuit reached a different conclusion regarding fleeing, so *Sparks* did not help defendant.

Finally, defendant noted that the Supreme Court recently heard argument in a case addressing whether drunk driving qualifies as a violent crime under the ACCA. The defense argument in that case primarily appears to be that drunk driving should not qualify because it does not require any mens rea. *See* Transcript of Oral Argument at 6, *Begay v. United States,* No. 06-11543 (Jan. 15, 2008). However, the fleeing statute at issue in this case requires the defendant act "knowingly." Thus, it is not comparable with drunk driving in that respect.

Therefore, I found that defendant qualified as an armed career criminal based on these three

convictions set forth in ¶ 19 of the PSR.[3] Defendant's final guideline calculations accordingly were offense level 33, U.S.S.G. § 4B1.4(b)(3)(B), criminal history category V, and 210-262 months imprisonment.

II. Section 3553(a)

A. Sentencing Factors

II. Section 3553(a) directs the sentencing cour to consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

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[3] Defendant also objected to the scoring of a municipal marijuana possession conviction in ¶ 44 of the PSR. That conviction was entered on February 5, 1997, (just) less than ten years prior to defendant's commission of the instant offense on January 29, 2007. Therefore, it scored under U.S.S.G. § 4A1.2(e)(2). This conviction increased defendant's criminal history score from 9 to 10, resulting in a criminal history category of V rather than IV. I considered under 18 U.S.C. § 3553(a) defendant's argument that this conviction, apparently entered by default and without counsel, had a disproportionate impact on the guideline range.

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; the kinds of sentences available; the advisory guideline range; 18 U.S.C. § 3553(a).

(3) the kinds of sentences available;

(4) the advisory guideline range;

(5) any pertinent policy statements issued by the Sentencing Commission;

(6) the need to avoid unwarranted sentence disparities; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

After considering these factors, the court must impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing—just punishment, deterrence, protection of the public and rehabilitation of the defendant. *Id.* In making this determination, the district court may not presume that the guideline sentence is the correct one or elevate the guidelines above the other factors in the statute. *See, e.g., Rita v. United States,* 127 S.Ct. 2456, 2465 (2007); *United States v. Schmitt,* 495 F.3d 860, 864-65 (7th Cir.2007); *United States v. Sachsenmaier,* 491 F.3d 680, 685 (7th Cir.2007); *United States v. Demaree,* 459 F.3d 791, 794-95 (7th Cir.2006), *cert. denied,* 127 S.Ct. 3055 (2007).

Rather, it is the statute's "parsimony provision that serves as 'the guidepost for sentencing decisions post-*Booker*.'" *United States v. Santoya*, 493 F.Supp.2d 1075, 1077 (E.D.Wis.2007) (quoting *United States v. Ferguson*, 456 F.3d 660, 667 (6th Cir.2006)). However, "*Booker* does not license district courts to employ § 3353 to disregard statutory mandatory minimum sentences." *United States v. James*, 487 F.3d 518, 530 (7th Cir.2007).

B. Analysis

1. Nature of Offense

On January 29, 2007, police executed a search warrant at 2528 West Locust Street, Milwaukee, which they believed to be defendant's home. Defendant and his granddaughter were present at the time, and officers recovered two handguns from a bedroom that contained various identifiers for defendant. Defendant also made various statements to the officers about the guns. Defendant later denied that he lived there or knowingly possessed the guns, but the jury concluded otherwise and convicted him of felon in possession.

The record contained no evidence that defendant ever used the guns, threatened anyone with them, or carried them on his person. Therefore, the offense conduct was not in any way aggravated.

2. Character of Defendant

Defendant was fifty-one years old and had a serious and very lengthy record containing crimes of violence, theft, drug offenses and gun cases. Although his violent offenses seemed to be in the

past, he continued to commit crimes as he aged, including convictions for operating a vehicle without owner's consent and possession with intent to deliver marijuana within the past four to five years. He also had little employment record, particularly for someone his age.

Defendant was married from 1991 to 2003 and had three adult children. His ex-wife made positive statements to the PSR writer, as did his daughter. Numerous family members appeared in support at defendant's sentencing hearing. I also received a positive letter from his pastor, indicating that defendant was involved in the church.

Defendant reported some health problems, but it was not clear how serious they were. He admitted a problem with alcohol, as well as past use of marijuana and cocaine. His early screens on pre-trial release in this case were positive for marijuana, but negative thereafter. He largely complied with pre-trial release before he was remanded after the jury's verdict.

3. Guidelines and Purposes of Sentencing

The guidelines called for a term of 210-262 months and the statute required a sentence of 180 months. Under all of the circumstances, I found a sentence of 180 months sufficient but not greater than necessary. No more was needed to provide just punishment. The guns were found under a bed in a shared home, not on defendant's person or in his car. There was no indication that he ever used the guns or possessed them for any purpose other than protecting the home. *See* 18 U.S.C. § 3553(a)(2)(A).

Defendant's record was serious, but a sentence of 15 years was sufficient to protect the public. *See* § 3553(a)(2)(C). He will be in his mid-60's when released. I also considered the fact that defendant's criminal history category was increased from IV to V based on the inclusion of the 1997 marijuana possession conviction, which was obtained in municipal court, apparently by default, and scored by only a few days. But for that conviction, the guideline range would have been 188-235 months.

Likewise, a 15 year sentence—three times as long as any previous sentence he had served—was sufficient to deter him from re-offending. *See* § 3553(a)(2)(B). This sentence varied a bit from the guidelines, but was supported by the particular facts of the case, so it did not create unwarranted disparity. *See* § 3553(a)(6).

III. CONCLUSION

Therefore, I committed defendant to the custody of the Bureau of Prisons for 180 months. I recommended that he be placed at a facility as close to Milwaukee as possible and participate in any substance abuse treatment available, including the 500 hour program. Upon release, I ordered him to serve three years of supervision, with a drug aftercare and other conditions that appear in the judgment.

UNITED STATES DISTRICT COURT

Case No. 07-CR-81

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

ANTHONY DISMUKE,

Defendant.

DECISION AND ORDER

Defendant Anthony Dismuke, charged with possessing firearms as a felon, moved to suppress evidence seized from his home pursuant to a search warrant. He argued that the warrant application failed to establish probable cause for the search and sought an evidentiary hearing on the issue of whether the officers acted in good faith in applying for and executing the warrant.

The motion was referred to a magistrate judge, who declined to hold a hearing and recommended that the motion be denied. Defendant objects, requiring me to the review the matter de novo. Fed. R. Crim. P. 59(b)(3).

I. FACTS

On January 28, 2007, Milwaukee Police Department ("MPD") Officer Anthony Randazzo applied for a search warrant. In his affidavit, Randazzo averred that on January 27, 2007, he was contacted by a reliable confidential informant who stated that he had information about a subject in possession of at least three firearms. The informant stated that he had seen Anthony Dismuke, a black male, in possession of at least three firearms within the last week. The informant further stated that Dismuke lived at 2528 West Locust Street. The informant was able to identify Dismuke from a photograph as the person he had seen with a gun in his possession within the last week at 2528 West Locust. The informant stated that Dismuke possessed two pistols and a shotgun. Randazzo stated that he confirmed through questioning that the informant was familiar with firearms and knew the difference between semi-automatic weapons, revolvers, rifles, shotguns and non-firearm weapons like compressed air guns.

Randazzo averred that he checked Wisconsin court records and learned that Dismuke had been convicted of three felonies. Randazzo further averred that on January 27, 2007, he was able to confirm through driver's license information that Anthony Dismuke lived at 2528 West Locust Street. Randazzo stated that he also located an auto parked in the rear of 2528 West Locust which listed to Dismuke at the Locust Street address. Randazzo further stated that he knew 2528 West Locust to be a two story residence with brown siding, yellow trim and a black roof.

Randazzo averred that disclosure of the informant's identity would end the informant's usefulness to the MPD, discourage citizens from cooperating with the police and result in possible harm to the informant. Based on the informant's statement that Dismuke sells guns from his residence and keeps his own guns in the residence for protection, as well as Dismuke's record, Randazzo requested permission to enter without knocking.

A Milwaukee County Court Commissioner issued a no-knock warrant on January 28, 2007, which MPD officers executed the next day.

II. DISCUSSION

A. Applicable Legal Standard

In ruling on a motion to suppress evidence recovered pursuant to a search warrant, the court employs a sequential two-step test. See *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002). The court first determines whether there is substantial evidence in the record supporting the magistrate's finding of probable cause to issue the warrant. *United States v. Lloyd*, 71 F.3d 1256, 1262 (7th Cir. 1995). When, as in the present case, "the affidavit is the only evidence presented to the warrant-issuing magistrate, 'the warrant must stand or fall solely on the contents of the affidavit.'" *Koerth*, 312 F.3d at 866 (quoting *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967)).

Probable cause to issue a warrant exists when the warrant application alleges facts sufficient to induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United*

States v. Peck, 317 F.3d 754, 756 (7th Cir. 2003). The Supreme Court has explained that:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983).

The reviewing court considers the warrant application in a realistic and common sense manner in order to determine whether it alleges specific facts and circumstances that would permit the issuing magistrate to reasonably conclude that the evidence sought to be seized was associated with the crime alleged and located in the place indicated. *Koerth*, 312 F.3d at 866-67. Where the warrant application is supported by an informant's tip, the reviewing court considers:

> (1) whether the informant personally observed the events, (2) the degree of detail shown in the informant's statements, (3) whether the police independently corroborated the information, (4) the interval of time between the events and application for a warrant, and (5) whether the informant appeared in person before the judicial officer who issued the warrant.

United States v. Mykytiuk, 402 F.3d 773, 776 (7th Cir. 2005). No single factor is dispositive, and a

deficiency in one may be compensated for by a strong showing in another or by some other indication of reliability. Peck, 317 F.3d at 756; *United States v. Brack*, 188 F.3d 748, 756 (7th Cir. 1999). Ultimately, the reviewing court must give the magistrate's determination of probable cause considerable weight and resolve doubtful cases in favor of upholding the warrant. *United States v. Quintanilla*, 218 F.3d 674, 677 (7th Cir. 2000).

If the court finds the warrant deficient, it must then proceed to the second step of the analysis, which is to determine whether the executing police officer could "have *reasonably believed* that the facts set forth in the affidavit were sufficient to support a magistrate's finding of probable cause." *Koerth*, 312 F.3d at 866 (citing *United States v. Leon*, 468 U.S. 897, 920-24 (1984)). The government bears the burden of demonstrating by a preponderance of the evidence that the police relied in "good faith" on the magistrate's decision to issue the warrant. *Koerth*, 312 F.3d at 868. An officer's decision to seek a warrant is prima facie evidence that he acted in good faith. Peck, 317 F.3d at 757; *Koerth*, 312 F.3d at 868. "The defendant must defeat this presumption with evidence that the issuing magistrate judge wholly abandoned his judicial role or that the officer's affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Wiley*, 475 F.3d 908, 917 (7th Cir.), *cert. denied*, 127 S. Ct. 2966 (2007).

B. Analysis

1. Probable Cause

Probable cause supported the warrant in the present case. The informant gave Officer Randazzo recent, first-hand information, stating that he saw defendant with three firearms within the past week. See *Lloyd*, 71 F.3d at 1263 (recognizing that an informant's first-hand observations support a finding of reliability); *United States v. Muhammad*, 928 F.2d 1461, 1465 (7th Cir. 1991) (upholding warrant based on an informant's statement that he observed a gun in the defendant's residence within a week of the warrant application); *United States v. Price*, 888 F.2d 1206, 1209 (7th Cir. 1989) (upholding warrant based on "recent, first-hand information").[1] The informant provided defendant's full name and address, and identified defendant from a photograph. *See, e.g.*, *United States v. Madden*, 220 Fed. Appx. 290, 292 (5th Cir. 2007) (finding probable to search where the informant identified the defendant "by name

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[1] Defendant contends that the informant's statement that he saw the guns "within the last week" is vague. However, in context it appears plain that the informant made his observation some time between January 20 and January 27. Courts have held that such passage of time is insignificant when dealing with a continuing offense such as firearm possession. *See, e.g.*, *United States v. Maxim*, 55 F.3d 394, 397 (8th Cir. 1995); *see also United States v. Harju*, 466 F.3d 602, 608 (7th Cir. 2006) (noting that "only three weeks had elapsed since the gun had been seen in Mr. Harju's possession on his property, and, unlike small amounts of drugs or cash, the gun was not likely to have been sold (or consumed) during that period of time").

and by photograph"); *United States v. Caldwell*, 423 F.3d 754, 760 (7th Cir. 2005) (finding probable cause based in part on a confidential informant's identification of the defendant from a photo). Further, the informant described the firearms defendant possessed as two pistols and a shotgun, and Randazzo confirmed that the informant understood the difference between various types of guns. Randazzo also confirmed the informant's information by checking driver's license records, learning that defendant lived at the address the informant provided, and by personally inspecting the residence, observing a car listed to defendant parked behind it. Finally, Randazzo checked court records, learning that defendant was a convicted felon and thus could not lawfully possess firearms. *See, e.g., United States v. Smith*, 182 F.3d 473 (6th Cir. 1999) (upholding warrant based on an informant's tip that he saw the defendant with two pistols, where police independently confirmed that the defendant was a convicted felon and lived at the address provided by the informant).

It is true that Randazzo provided no support for his assertion that the informant was "reliable." See *Koerth*, 312 F.3d at 867 (stating that an assertion that an informant is reliable is, absent any supporting factual information, entitled to no weight). However, reliability may be shown by means other than the informant's past record of reliability, such as "through independent confirmation or personal observation by the police, or by other methods." *United States v. Scott*, 19 F.3d 1238, 1242 (7th Cir. 1994). Randazzo corroborated the informant's information in the present case by having the informant identify defendant from a

photo, checking defendant's address against driver's license records, and personally traveling to defendant's residence, where he saw a car listed to defendant parked. Randazzo also quizzed the informant on his knowledge of firearms. Given this corroboration, Randazzo's failure to provide detail on the informant's situation and past reliability does not defeat probable cause.

Defendant also points to some uncertainty in the affidavit about how many firearms the informant saw inside 2528 West Locust. Specifically, while the informant indicated that he saw defendant "in possession of at least 3 firearms within the last week," he also stated that he saw defendant with "a gun . . . at the address of" 2528 West Locust. (Aff. for Search Warrant [R. 10-2] ¶ 4, emphasis added.) However, even if the informant only saw one gun (rather than three) inside 2528 West Locust, there was still probable cause to search for that gun. Furthers, "[c]ourts have acknowledged that individuals who own guns keep them at their homes." *Smith*, 182 F.3d at 480; *see, e.g., United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988) (collecting cases holding that it is reasonable to assume that individuals who have guns keep them in their homes); *see also United States v. Anderson*, 450 F.3d 294, 303 (7th Cir.), *cert. denied*, 127 S. Ct. 532 (2006) ("Probable cause does not require direct evidence linking a crime to a particular place. Instead, issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense.") (internal citation and quote marks omitted). Thus, the fact that the informant did not specify the

exact number and location of firearms within 2528 West Locust also does not defeat probable cause.[2]

Therefore, for all of these reasons and those stated by the magistrate judge, I find that the warrant was supported by probable cause.[3]

2. Good Faith

Even if the warrant was not supported by probable cause, I would uphold the search under Leon. The fact that the officers applied for a warrant represents prima facie evidence that they acted in good faith. The record contains no evidence that the court commissioner abandoned his neutral, detached judicial role, and the information contained in the warrant application was sufficient to allow the officers to reasonably believe that probable cause existed. While Randazzo's affidavit could have included more information, courts have found good faith reliance on less. See *Harju*, 466 F.3d at 603-04 (applying good faith exception to warrant based on statement from unidentified informant that his relative had seen the defendant

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[2] The informant also told Randazzo that defendant "keeps his own guns in the residence to protect him from people that may want to rob him." (Aff. for Search Warrant ¶ 8.) Thus, in addition to drawing the inference that persons who own guns often keep them in their homes, the issuing commissioner had specific information that defendant kept his guns in his house.

[3] Before the magistrate judge, defendant also argued the officers failed to execute the warrant "forthwith," rendering stale the information upon which the warrant was based. The magistrate judge properly rejected this argument, and defendant does not object to her analysis, which I adopt as my own. (Recommendation [R. 20] at 8-10.)

with a gun in his house about three weeks earlier).

Defendant asks me to conduct an evidentiary hearing on the issue of good faith. He proffers evidence which, he contends, demonstrates that Randazzo misled the issuing court commissioner. See Peck, 317 F.3d at 757 (stating that the good faith exception does not apply if the officers were reckless or dishonest in preparing the affidavit). Specifically, he contends that Randazzo overstated the contents of Department of Motor Vehicle ("DMV") records in two ways.

First, Randazzo averred that driver's license information showed that defendant "does live at 2528 W. Locust St." (Aff. for Search Warrant ¶ 4, emphasis added). Defendant argues that although DMV records show that he received a driver's license with that address on February 12, 2002, such records could not have shown that he currently lived at 2528 West Locust in January 2007, when the warrant issued. However, nothing in the DMV records defendant submits (R. 28-2) suggests that defendant had moved or used a different address in January 2007. It was entirely reasonable for Randazzo to believe that defendant continued to live at 2528 West Locust, the only address contained in the records, see Wis. Stat. § 343.22 (requiring a holder of a driver's license to notify the department of a change of address within ten days), and I cannot conclude that Randazzo attempted to mislead the court commissioner by using the present tense in discussing these DMV records.

Second, Randazzo averred that the auto he saw parked outside 2528 West Locust "lists to Dim-

suke at the address of 2528 W. Locus Street." (Aff. for Search Warrant ¶ 4.) Defendant states that DMV records show that the vehicle registration for the car in question expired on October 31, 2003, years before the warrant issued. (R. 28-3.) Thus, he contends that it was misleading for Randazzo to imply that the vehicle currently listed to defendant at 2528 West Locust. However, no other address appears in the vehicle records defendant submits. Further, the records show that the car was not only registered to defendant at 2528 West Locust but also titled to him at that address. Randazzo did not specifically rely on vehicle registration as opposed to title records. In any event, given the fact that 2528 West Locust was the only address appearing in all of defendant's DMV records, I see nothing slippery in Randazzo's use of the present tense in discussing those records.

Therefore, defendant has failed to make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Accordingly, his request for a hearing is denied.

III. CONCLUSION

THEREFORE, IT IS ORDERED that the magistrate judge's recommendation (R. 20) is **ADOPTED**, and the motion to suppress (R. 10, 11) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 21st day of August, 2007.

/s Lynn Adelman
LYNN ADELMAN
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 08-1693
April 19, 2010

Before

MICHAEL S. KANNE, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—v.—
ANTHONY DISMUKE,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 07 CR 81.
Lynn Adelman, *Judge*.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

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(2)

Supreme Court, U.S.
FILED
SEP 16 2010
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No. 10-109

In the Supreme Court of the United States

ANTHONY DISMUKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Wisconsin law for intentional vehicular flight from a law enforcement officer is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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In the Supreme Court of the United States

No. 10-109

ANTHONY DISMUKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 593 F.3d 582.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2010. A petition for rehearing was denied on April 29, 2010 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on July 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 180 months of imprisonment, to be followed by three

years of supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. On January 27, 2007, Milwaukee police were contacted by a confidential informant who reported that petitioner was in possession of a shotgun and two handguns. The informant provided petitioner's address and identified him in a photograph. Police confirmed that petitioner had prior felony convictions and that he resided at the address supplied by the informant. Police obtained a search warrant and searched petitioner's residence, where they recovered two handguns and ammunition. Petitioner was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), and a jury found him guilty of that offense. Pet. App. 4a-5a.

Pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), petitioner was subject to a mandatory minimum sentence of 15 years if he had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

At sentencing, petitioner did not dispute that his prior convictions under Wisconsin law for burglary and

armed robbery qualified as "violent felon[ies]" for ACCA purposes. Pet. App. 30a-31a. Petitioner did dispute, however, whether his prior conviction under Wisconsin law for intentional vehicular flight from a law enforcement officer qualified as an ACCA violent felony. *Id.* at 31a.[1] The district court concluded that petitioner's prior conviction for intentional vehicular flight was a violent felony, which meant that petitioner's advisory Guidelines range was 210 to 262 months of imprisonment (based on his criminal history category of V and his total offense level of 33). *Id.* at 31a-34a. After considering the factors in 18 U.S.C. 3553(a), however, the district court sentenced petitioner to the ACCA's statutory minimum of 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 37a-38a; see 2:07-CR-00081-LA-1 Docket entry No. 73 (E.D. Wis. Mar. 13, 2008).

2. The court of appeals affirmed. Pet. App. 1a-28a. It noted that petitioner did not dispute that Wisconsin's fleeing offense "present[s] a serious potential risk of physical injury similar in degree to the [ACCA's] enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives." *Id.* at 16a-17a. The court then rejected petitioner's argument that Wisconsin's fleeing offense does not involve "'purposeful, violent, and aggressive' conduct." *Id.* at 17a (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)). The court reasoned that "Wisconsin's fleeing offense requi-

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[1] According to the Presentence Investigation Report (PSR), on March 3, 1998, Milwaukee police officers attempted to conduct a traffic stop of petitioner's vehicle. Petitioner increased his speed, made several turns, and disregarded two stop signs. Petitioner eventually fled his vehicle on foot and was apprehended after a brief chase. PSR para. 46.

res a 'knowing' act of fleeing; this satisfies *Begay*'s 'purposeful' requirement." *Id.* at 20a. The court further reasoned that the Wisconsin offense involves "conduct [that] is violent and aggressive in the sense required by *Begay*," *id.* at 23a, because vehicular flight "will typically lead to a confrontation with the officer being diobeyed" and "[i]t is likely to lead, in the ordinary case, to a chase or at least an effort by police to apprehend the perpetrator," *id.* at 26a (quoting *United States* v. *West*, 550 F.3d 952, 970 (10th Cir. 2008)). The court concluded that "[a]ll of these circumstances increase the likelihood of serious harm to the officers involved as well as any bystanders that by happenstance get in the way of a fleeing perpetrator or his pursuers." *Ibid.* (quoting *West*, 550 F.3d at 970).

ARGUMENT

Petitioner contends (Pet. 10-26) that his prior felony conviction under Wisconsin law for intentional vehicular flight from a law enforcement officer is not a "violent felony" under the ACCA. Petitioner also contends that the decision below is inconsistent with this Court's decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 129 S. Ct. 687 (2009), as well as with decisions of the Eighth and Eleventh Circuits. Those contentions are without merit. Petitioner's vehicular flight conviction is significantly different in kind and degree from the driving-under-the-influence conviction at issue in *Begay* and the failure-to-report conviction at issue in *Chambers*. Moreover, there is no square conflict in the courts of appeals on the question presented. The Court has declined to review this question several times, and the same disposition is appropriate here.

1. a. In *Begay*, this Court held that felony driving under the influence (DUI) does not qualify as a violent felony under the ACCA. The Court reasoned that, to qualify as a violent felony under the ACCA's residual clause, an offense must be "roughly similar, in kind as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving use of explosives, and thus must "typically involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 142-145 (internal quotation marks omitted). The Court held that the DUI offense at issue did not satisfy that definition because, even assuming that DUI "presents a serious potential risk of physical injury to another," it is a "strict-liability" offense that "typically" does not involve "purposeful" conduct. *Id.* at 144-146.

The decision below is consistent with *Begay*. Unlike drunk driving, vehicular flight from a law enforcement officer involves purposeful, violent, and aggressive conduct. As an initial matter, vehicular flight from police is purposeful conduct because the Wisconsin statute provides that the flight must be done "knowingly." Wis. Stat. Ann. § 346.04(3) (West 2005); see *United States* v. *Harrimon*, 568 F.3d 531, 534 (5th Cir.) ("[U]nlike the DUI statute at issue in *Begay*, fleeing by vehicle requires intentional conduct."), cert. denied, 130 S. Ct. 1015 (2009). And because vehicular flight "calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit," it is an inherently violent and aggressive crime. *United States* v. *Spells*, 537 F.3d 743, 752 (7th Cir. 2008), cert. denied, 129 S. Ct. 2379 (2009). Vehicular flight "'will typically lead to a confrontation with the officer being disobeyed,' a confrontation fraught with risk of vio-

lence." *Harrimon*, 568 F.3d at 535 (quoting *United States* v. *West*, 550 F.3d 952, 970 (10th Cir. 2008)).

An offender's "willingness to use a vehicle to flout an officer's lawful order to stop" also demonstrates an increased risk that "the offender would, if armed and faced with capture, 'deliberately point the gun and pull the trigger.'" *Harrimon*, 568 F.3d at 535 (quoting *Begay*, 553 U.S. at 146); see *Welch* v. *United States*, 604 F.3d 408, 425 (7th Cir. 2010) ("An individual's purposeful decision to flee an officer in a vehicle when told to stop, reflects that if that same individual were in possession of a firearm and asked to stop by police, [he] would have a greater propensity to use that firearm in an effort to evade arrest.") (quoting *Spells*, 537 F.3d at 752, and brackets in original), petition for cert. pending, No. 10-314 (filed Sept. 1, 2010). Vehicular flight by its very nature "creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." *Harrimon*, 568 F.3d at 536 (quoting *West*, 550 F.3d at 964-965).

b. The decision below is also consistent with *Chambers*, which held that failure to report for penal confinement is not a violent felony under the ACCA. Vehicular flight from police presents risks different in kind and degree from those presented by the failure-to-report offense at issue in *Chambers*. Unlike the passive conduct of failing to report, vehicular flight from police cannot be characterized as "a form of inaction," *Chambers*, 129 S. Ct. at 692, because it involves deliberate movement to evade the police. See *United States* v. *Sykes*, 598 F.3d 334, 337 (7th Cir. 2010) ("[The Indiana statute's] knowing and intentional requirement means that a typical offender does not simply fail to appear before authorities, but affirmatively eludes police custody by

choosing to continue driving rather than pull over."), petition for cert. pending, No. 09-11311 (filed June 9, 2010). For that reason, vehicular flight from police is similar not to the crime of failure to report for penal confinement but to the crime of escape from custody. See *Chambers*, 129 S. Ct. at 691 (contrasting "[t]he behavior that likely underlies a failure to report" with "the less passive, more aggressive behavior underlying an escape from custody"); Pet. App. 27a ("Th[e] active defiance of an attempted stop or arrest is similar to the behavior underlying an escape from custody.") (quoting *Harrimon*, 568 F.3d at 535) (brackets in original).

c. The decision below is also consistent with *Taylor* v. *United States*, 495 U.S. 575 (1990), and *James* v. *United States*, 550 U.S. 192 (2007), which direct courts applying the ACCA to focus on "the conduct encompassed by the elements of the offense, in the ordinary case." *Id.* at 208. In the ordinary case, flight from an officer's command to stop involves a substantial and inherent risk of physical injury because of the "marked likelihood of pursuit and confrontation." *Harrimon*, 568 F.3d at 536; see *ibid.* ("[W]e think that, in the typical case, an offender fleeing from an attempted stop or arrest will not hesitate to endanger others to make good his or her escape."). Vehicular flight, like escape from custody, is a continuing offense that encompasses conduct likely to occur at the end of the pursuit by law enforcement officers. See *United States* v. *Martin*, 378 F.3d 578, 582-583 (6th Cir. 2004) ("Both escape and fleeing from a police officer represent continuing offenses, which heighten the emotions and adrenaline levels of the parties involved, and which generally end with a confrontation between the officer and the escapee or fleeing driver.") (internal quotation marks, brackets, and cita-

tions omitted). As with the ACCA's enumerated crimes (like burglary or arson), vehicular flight creates the potential for a dangerous confrontation between the suspect and other individuals.

2. Petitioner contends (Pet. 10-22) that the courts of appeals are in conflict over whether vehicular flight from police is a "violent felony" under the ACCA or a "crime of violence" under Sentencing Guidelines § 4B1.2(a).[2] But there is no disagreement among the courts of appeals with respect to offenses like petitioner's that typically present a substantial risk of injury to police officers or other individuals.

Five courts of appeals (the First, Fifth, Sixth, Tenth, and Eleventh Circuits) have agreed with the Seventh Circuit that intentional flight from a law enforcement officer is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines. See *United States* v. *McConnell*, 605 F.3d 822, 827-830 (10th Cir. 2010) (Guidelines); *United States* v. *Layton*, 356 Fed. Appx. 286, 290 (11th Cir. 2009) (Guidelines), cert. denied, 130 S. Ct. 3467 (2010); *Harrimon*, 568 F.3d at 534-537 (ACCA); *United States* v. *LaCasse*, 567 F.3d 763, 767 (6th Cir. 2009) (ACCA), cert. denied, 130 S. Ct. 1311 (2010); *Powell* v. *United States*, 430 F.3d 490, 491 (1st Cir. 2005) (per curiam) (ACCA), cert. denied, 547 U.S. 1047 (2006). Those courts have reasoned that a driver's intentional act of fleeing from a law enforcement officer is a purposeful, violent, and aggressive act. See, *e.g.*, *Harrimon*, 568 F.3d at 534-537.[3]

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[2] The ACCA's definition of a "violent felony" is identical for present purposes to Sentencing Guidelines § 4B1.2(a)'s definition of a "crime of violence."

[3] In *United States* v. *Rivers*, 595 F.3d 558 (2010), the Fourth Circuit held that a conviction under South Carolina law for failure to stop for

a. Petitioner claims (Pet. 12) a conflict with *United States* v. *Tyler*, 580 F.3d 722 (8th Cir. 2009), in which a divided panel held that the Minnesota offense of vehicular flight from a law enforcement officer is not a crime of violence under Sentencing Guidelines § 4B1.2(a). The Minnesota statute at issue in *Tyler*, like the Wisconsin statute at issue here, prohibits increasing a vehicle's speed or extinguishing its lights in an attempt to flee or elude officers. See 580 F.3d at 725; see also Wis. Stat. Ann. § 346.04(3) (West 2005) (prohibiting an "operator of a vehicle" from "increas[ing] the speed of the * * * vehicle or extinguish[ing] the lights of the vehicle in an attempt to elude or flee"). As petitioner recognizes (Pet. 13), the Eighth Circuit concluded in *Tyler* that although "such actions are admittedly disobedient, they do not necessarily translate into a serious potential risk of physical injury." 580 F.3d at 725. In this case, however, petitioner "concedes that the [Wisconsin] offense involves conduct that presents a serious potential risk of physical injury and is sufficiently similar to the residual clause's enumerated crimes in respect to the 'degree of risk posed' to satisfy this part of the *Begay* framework."

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a blue light, S.C. Code Ann. § 56-5-750(A) (2006), does not constitute a violent felony under the ACCA. *Rivers*, 595 F.3d at 565. Unlike the Wisconsin statute at issue, however, the South Carolina blue light statute does not require that a driver have acted intentionally. *Ibid.* The Fourth Circuit reasoned that, as "a strict liability crime," the statute does not proscribe purposeful, aggressive, and violent conduct as required by *Begay*. *Ibid.* (quoting *Begay*, 553 U.S. at 148). *Rivers* therefore does not conflict with the decisions of the other courts of appeals that have held that intentional vehicular flight is a violent felony under the ACCA or a crime of violence under Section 4B1.2(a) of the Guidelines.

Pet. App. 17a.[4] The present case is therefore distinguishable from *Tyler*, because petitioner did not dispute before the lower courts that the Wisconsin offense satisfies the risk requirement of the ACCA's residual clause.

Although the Eighth Circuit held in the alternative in *Tyler* that the Minnesota offense did not involve violent and aggressive conduct in the typical case, see 580 F.3d at 725, its discussion of that issue built on and was influenced by its earlier holding that the Minnesota offense did not necessarily involve a serious risk of physical injury to others. See *ibid.* ("[T]he elements of the statute do not require a confrontation, chase, or any other conduct indicating that the crime in question nec-

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[4] According to petitioner (Pet. 23 n.11), he did not concede below that the Wisconsin offense involves conduct presenting a serious risk of physical injury comparable to that posed by the ACCA's enumerated crimes, as required under this Court's decision in *Begay*. In his brief to the court of appeals, petitioner stated in a single sentence that the conduct of which he was convicted—eluding police by increasing his vehicle's speed—"[did] not require interference with or endangerment of the police, other vehicles, or pedestrians." Pet. C.A. Br. 31. Petitioner did not develop that argument in any way. Rather, he noted contrary circuit precedent holding that vehicular flight does present a serious risk of physical injury to others, *ibid.* (citing *United States* v. *Howze*, 343 F.3d 919 (7th Cir. 2003)), without offering any argument to show that the precedent was incorrect or had been undermined by this Court's subsequent decision in *Begay*. Petitioner then argued at length that the Wisconsin offense did not involve violent and aggressive conduct within the meaning of *Begay*. *Id.* at 32-35. In those circumstances, the court of appeals reasonably concluded that petitioner was contesting only the second component of the *Begay* test. Petitioner also claims (Pet. 24 n.11) that he disputed the first component of the *Begay* test in his rehearing petition, but he simply cited a decision from the Ninth Circuit addressing a different state statute. See C.A. Pet. for Reh'g 2. Petitioner did not develop any argument that vehicular flight under Wisconsin law does not present a serious risk of physical injury to others.

essarily involves conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive."). Thus, the issue that petitioner failed to dispute in the court of appeals in this case not only was the Eighth Circuit's principal ground of decision in *Tyler*, but also was a ground that influenced the Eighth Circuit's subsequent discussion of whether simple vehicular flight is violent and aggressive within the meaning of *Begay*. For that reason, whatever the tension between a portion of the decision in *Tyler* and the decision below in this case, there is no square conflict warranting review in this case.

b. Petitioner further claims (Pet. 14) a conflict with *United States* v. *Harrison*, 558 F.3d 1280 (11th Cir. 2009). The Florida statute at issue in *Harrison* created separate offenses for simple vehicular flight and aggravated vehicular flight that involves high speed or that recklessly disregards the safety of persons or property. See Fla. Stat. Ann. § 316.1935(1), (2), and (3) (West 2006). In *Harrison*, the Eleventh Circuit held that simple vehicular flight is not a violent felony for ACCA purposes, while indicating that Florida's forms of aggravated vehicular flight would be violent felonies. See 558 F.3d at 1291, 1295-1296.

Here, the court of appeals similarly held that the Wisconsin statute creates two different kinds of fleeing offenses: knowing flight from an identified law enforcement officer (i) by "willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians" or (ii) by "increas[ing] the speed of the operator's vehicle or extinguish[ing] the lights of the vehicle in an attempt to elude or flee." Wis. Stat. Ann. § 346.04(3) (West 2005); see Pet. App. 15a-16a. The

court of appeals therefore consulted the state court criminal complaint, which indicated that petitioner had committed the Wisconsin offense by increasing the speed of his vehicle in an attempt to elude officers. *Id.* at 16a.

The court of appeals correctly concluded—in accord with the majority of other circuits but not in accord with the Eleventh Circuit's decision in *Harrison* —that even if flight that occurs by increasing the vehicle's speed does not create an actual risk of death or injury to third parties in every case, it does create a potential risk of serious harm to others in the typical case. For instance, the Sixth Circuit has held that "[a]s a categorical matter, the decision to flee thus carries with it the requisite potential risk, even if the resulting chase does not escalate so far as to create [an] actual risk of death or injury." *United States* v. *Rogers*, 594 F.3d 517, 521 (6th Cir. 2010), petition for cert. pending, No. 09-10276 (filed Apr. 13, 2010). Likewise, the Fifth Circuit has held that "while it is possible * * * to be guilty of fleeing by vehicle despite obeying all traffic laws and later surrendering quietly, * * * in the typical case, an offender * * * will not hesitate to endanger others to make good his or her escape." *Harrimon*, 568 F.3d at 536.

The Eleventh Circuit's decision in *Harrison* is distinguishable, however, because the court's holding rested on the limited evidentiary record in that case. See 558 F.3d at 1295-1296. The court recognized that in similar cases the Supreme Court "has used statistical evidence to aid its risk assessment" and that its own consideration "would benefit from empirical evidence of the likelihood of physical injury in statutory willful fleeing crimes that do not have the elements of high speed or

reckless disregard." *Id.* at 1294-1295. "[B]ased on the limited record," which did not contain any "empirical data," the court concluded that the government had not satisfied its burden of showing that the Florida offense was a violent felony for ACCA purposes. *Id.* at 1296. Thus, the court left the door open for the government to make such a showing on a more developed factual record in a future case. *Ibid.*

Other courts have considered the sort of statistical evidence not present in *Harrison*. For instance, the Fifth Circuit in *Harrimon* noted that, according to a study "collecting police pursuit data from fifty-six law enforcement agencies in thirty states, 314 injuries (including fatal injuries) to police and bystanders resulted from 7,737 reported pursuits," or "roughly .04 injuries to others per pursuit." 568 F.3d at 537. By comparison, "there are roughly 267,000 fires attributed to arson per year, resulting in over 2,475 injuries * * * or roughly .009 injuries per arson." *Ibid.* The Fifth Circuit therefore concluded that "the risk of injury to others [from vehicular flight] would appear to be at least 'roughly similar' to that associated with arson." *Ibid.* (quoting *Begay*, 553 U.S. at 143). In light of the Fifth Circuit's analysis, this Court's review would be premature, because the Eleventh Circuit should be permitted to revisit the question on a more developed evidentiary record.

3. Further consideration in the courts of appeals—including examination of pertinent differences among the state statutes in question—will bear directly on the need for this Court's review. The Court has denied several petitions for writs of certiorari presenting the question of whether prior convictions under state vehicular flight statutes qualify as violent felonies under the

ACCA or crimes of violence under the Guidelines. See *Spells* v. *United States*, 129 S. Ct. 2379 (2009) (No. 08-8136) (Indiana statute); see also *Layton* v. *United States*, 130 S. Ct. 3467 (2010) (No. 09-9658) (Florida statute); *Collier* v. *United States*, 130 S. Ct. 1882 (2010) (No. 09-7631) (Texas statute); *LaCasse* v. *United States*, 130 S. Ct. 1311 (2010) (No. 09-8204) (Michigan statute); *Sneed* v. *United States*, 130 S. Ct. 1285 (2010) (No. 09-7276) (Texas statute); *Harrimon* v. *United States*, 130 S. Ct. 1015 (2009) (No. 09-6395) (Texas statute). The same disposition is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2010

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No. 10-109

IN THE

Supreme Court of the United States

ANTHONY DISMUKE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner's Supplemental Brief

Petitioner Anthony Dismuke submits this supplemental brief to request that this Court hold his Petition pending the resolution of *Sykes v. United States*, *petition for cert. granted*, 79 U.S L.W. 3194 (U.S. Sept. 28, 2010) (No. 09-11311).

Both *Sykes* and this case concern whether a state vehicular fleeing statute, which criminalizes nonviolent conduct, is a violent felony under the residual clause of section 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA"). *Compare United States v. Sykes*, 598 F.3d 334, 335-39 (7th Cir. 2010), *with* Pet. App. at 11a-28a.

In *Sykes*, the Seventh Circuit held that Indiana's resisting law enforcement statute, which is violated when a person uses a vehicle to "knowingly or intentionally" flee from a law enforcement officer, was a violent felony. 598 F.3d at 336-37; Ind. Code § 35-44-3-3(b)(1)(A). Relying on this case, the Seventh Circuit found that such nonviolent flight satisfied this Court's two-prong test articulated in *Begay v. United States*, 553 U.S. 137, 144-45 (2008). *Id.* The Seventh Circuit held that Indiana's statute met the first prong of *Begay's* test because "the act of fleeing an officer in a vehicle 'involves a serious potential risk of physical injury to others.'" *Id.* at 336 (citation omitted). The Seventh Circuit also held that the statute's conduct was purposeful, violent, and aggressive and thus satisfied *Begay's* second prong, even though "a predicate offense may not *require* that an offender actually endanger others

through his flight." *Id.* at 336-37 (emphasis in original).

Based on the same reasoning, the Seventh Circuit found that Mr. Dismuke's conviction under the second, non-violent part of the Wisconsin vehicular fleeing statute was a violent felony. Pet. App. at 28a. Like the Indiana statute at issue in *Sykes*, the second part of the Wisconsin fleeing statute does not depend on whether the flight endangers anyone or anything. The Wisconsin statute is violated if an individual only "increase[s] the speed" of the vehicle or "extinguish[es]" its lights "in an attempt to elude or flee." Pet. App. 19a-20a; Wis. Stat. § 346.04(3). Nonetheless, the Seventh Circuit held that the second part of Wisconsin's statute met *Begay*'s first prong because it is "sufficiently similar in degree of potential risk to the residual clause's enumerated crimes." Pet. App. 17a n.3. In addition, the Seventh Circuit held that the nonviolent part of Wisconsin's fleeing statute met *Begay's* second prong for the exact same reason cited in *Sykes*: "[t]aking flight [in a vehicle] calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in pursuit." Pet. App. at 26a (quoting *United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2379 (2009)) (alteration in original); *see also Sykes*, 598 F.3d at 336 (finding that "besides daring a cop to endanger himself by giving chase, the act of fleeing police in a vehicle typically creates a risk of harm to other drivers and pedestrians" (citing *Spells*, 537 F.3d at 751-52)).

Because in both *Sykes* and this case, the Seventh Circuit found that nonviolent state vehicular fleeing statutes constituted violent felonies under the ACCA's residual clause based on the same reasoning, any decision that this Court reaches in *Sykes* will directly affect the outcome of Mr. Dismuke's Petition. As such, this Court should hold Mr. Dismuke's Petition pending the resolution of *Sykes*.

Respectfully submitted,

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October 13, 2010

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(3)

No. 10-109

Supreme Court, U.S.
SEP 27 2010
OFFICE OF THE CLERK

IN THE

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ANTHONY DISMUKE,

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Petitioner's Reply Brief

In one breath, the Government argues that the circuits are easily reconciled and that Petitioner's thorough description of the utter confusion that the courts have created on the issue of whether nonviolent vehicular fleeing statutes are violent felonies under the Armed Career Criminal Act ("ACCA") is overstated. In the other, the Government cites the numerous other petitions that this Court has denied on this issue and contends that this Petition should meet the same fate. The Government's arguments do not mesh—if the precedent on this issue is so clear why the numerous and continuing petitions to this Court?

Rather, the multiple petitions on whether nonviolent fleeing statutes meet this Court's two-part test as articulated in *Begay v. United States*, 553 U.S. 137, 144-45 (2008), are convincing evidence of the deep and entrenched confusion among the circuits. That confusion and the lack of consistent precedent is only worsening. In fact, circuits continue to reach different outcomes on the very same state's nonviolent fleeing statutes. As a result, individuals like Mr. Dismuke face varied and contradictory results depending entirely on the state in which they are sentenced.

Only this Court can settle this question. Accordingly, certiorari should be granted to rectify the circuit split and instruct the circuits on the correct application of this Court's precedent.

I. THE SPLIT IS ENTRENCHED AND WORSENING.

The Government fails in its attempt to reconcile the circuits and paint the current state of the law as clear. As described in the Petition, the circuits fall into two disparate and entrenched camps. On one end of the spectrum, the Eighth and Eleventh Circuits have analyzed whether state vehicular fleeing statutes are violent felonies based on case-by-case analysis of the statutes' relevant elements—as required by this Court in *Chambers v. United States*, 129 S. Ct. 687, 691-92 (2009). Under that appropriate analysis, these two circuits have held that nonviolent fleeing statutes like the one at issue here do not meet *Begay's* two-part test and thus are not violent felonies. At the same time, both circuits have concluded that fleeing statutes which present a serious potential risk of physical injury and contain aggressive and violent elements similar to the ACCA's enumerated crimes, are violent felonies.

The decisions from the circuits at the other end of the spectrum make no attempt at distinguishing between nonviolent and violent fleeing statutes. The Fifth, Sixth, Seventh, and Tenth Circuits have ruled without regard as to whether state fleeing statutes turn on the presence of dangerous, violent, or aggressive conduct. These circuits have essentially held that vehicular fleeing is a *per se* violent felony.

The Government's attempt to lessen the appearance of a split relies on its argument that the Eleventh Circuit found that a vehicular fleeing statute was a crime of violence. Opp. Br. at 8 (citing

United States v. Layton, 356 Fed. Appx. 286 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3467 (2010)). That ruling, however, does nothing to reconcile the split. In *Layton*, the Eleventh Circuit properly labeled subsection three of Florida's fleeing statute, which includes fleeing at "high speed" and in "a wanton disregard for the safety of persons or property," a crime of violence. *Id.* at 289-90. Indeed, Mr. Dismuke pointed out the same in his brief. *See* Pet. Br. at 14 n.7 (citing *United States v. Harris*, 586 F.3d 1283, 1287-88 (11th Cir. 2009), *petition for cert. filed*, (U.S. May 14, 2010) (No. 09-10868)). Both *Layton* and *Harris* demonstrate that the Eleventh Circuit is following this Court's precedent and distinguishing statutes that contain dangerous, violent, and aggressive elements from those that do not.[1]

Moreover, yet another two circuits have reached opposite conclusions on the same state's fleeing

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[1] The Government also included the First Circuit in its discussion of the split based on that circuit's decision in *Powell v. United States*, 430 F.3d 490 (1st Cir. 2005), *cert. denied*, 547 U.S. 1047 (2006). Opp. Br. at 8. But *Powell* was decided before this Court issued its rulings in *Begay* and *Chambers*. As such, most circuits do not reference the First Circuit as having weighed on this split. *See, e.g.*, Pet. App. at 28a ("Although the Eighth and the Eleventh Circuits have reached the opposite conclusion . . . we think our colleagues in the Fifth, Sixth, and Tenth Circuits have the better of the argument." (internal citations omitted)). Further, the Maine fleeing statute at issue in *Powell* was not a nonviolent fleeing statute. It contained elements such as driving at a "reckless rate of speed" and creating "a high-speed chase" with police officers. *Powell*, 430 F.3d at 492 (citing Me. Rev. Stat. tit. 29, § 2501-A(3)).

statute. In addition to the split between the Eighth Circuit and Ninth Circuit (unpublished decision) on Oregon's fleeing statute cited in the Petition, Pet. Br. at 19-20, the Seventh Circuit has now split with the Eighth Circuit on whether Minnesota's nonviolent fleeing statute meets *Begay's* test.

In *United States v. Askew*, the Seventh Circuit held that Minnesota's fleeing statute, which is violated by attempting to flee a peace officer by increasing speed or extinguishing the vehicle's lights, is a crime of violence. No. 09-2846, 2010 WL 2711276, at *1-2 (7th Cir. July 8, 2010) (citing Minn. Stat. § 609.487(1)-(3)). Relying on this case, the Seventh Circuit held that Minnesota's non-violent statute presents a "serious potential risk of physical injury" and "involves violent conduct in the run-of-the-mill case." *Id.* at *3-4. In *United States v. Tyler*, 580 F.3d 722, 725 (8th Cir. 2009), the Eighth Circuit reached the opposite conclusion, holding that "the elements of the [Minnesota] statute do not require a confrontation, chase, or any other conduct indicating that the crime in question necessarily involves conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive." *Id.* at 725. The Eighth Circuit reached this same conclusion in two other cases: *United States v. Furqueron*, 605 F.3d 612 (8th Cir. 2010) and *United States v. Johnson*, 601 F.3d 869 (8th Cir. 2010). Indeed, the Seventh Circuit acknowledged this precise split, stating that "in *Furqueron*, *Johnson*, and *Tyler*, the Eighth Circuit reached a different conclusion concerning the very Minnesota statute at issue here." *Askew*, 2010 WL 2711276, at *4 n.5.

Furthering the need for this Court's intervention, circuits also are beginning to question whether their rulings that nonviolent fleeing statutes are violent felonies are consistent with this Court's ACCA precedent. Mr. Dismuke has made this Court aware of Judge Richard Posner's dissent from the Seventh Circuit's decisions on this issue, inviting this Court to resolve the confusion. Pet. Br. at 4. A panel from the Sixth Circuit has also recently expressed reservations about finding that nonviolent fleeing statutes meet *Begay's* test. *United States v. Stephens*, No. 09-1159, 2010 U.S. App. LEXIS 18346 (6th Cir. Aug. 30, 2010). After explaining that the Sixth Circuit has held "that even fleeing and evading in the *fourth* degree under Michigan law . . . constitutes a crime of violence," the *Stephens* panel dropped the following footnote:

> This all said, we do wish to express that we are somewhat concerned with the direction our case law has been taking by expanding, where the Supreme Court in *Chambers* and *Begay* instead appears to be moving toward narrowing, the definition of "crime of violence" or "violent felonies" within the meaning of the Guidelines or the ACCA.

2010 U.S. App. LEXIS 18346, at *12 & n.5.

The spilt on whether nonviolent fleeing statutes are violent felonies or crimes of violence is entrenched and will continue to result in disparate results until this Court settles the issue.

II. THE GOVERNMENT IGNORES AND MISAPPLIES THIS COURT'S ACCA PRECEDENT.

The Government does not dispute the Seventh Circuit's conclusion that the Wisconsin fleeing statute has two parts: one which contains language requiring the endangerment of others and one which does not. Nor does the Government contest the Seventh Circuit's conclusion that Mr Dismuke violated only the second, non-violent part of the Wisconsin statute. Nevertheless, the Government attempts to conflate the two parts of the Wisconsin statute in an effort to argue that Mr. Dismuke's offense qualifies as a violent felony and the circuits are therefore not conflicted. Opp. Br. at 5-6, 7-8, 12-13. This argument is directly contrary to this Court's teaching in *Taylor v. United States*, 495 U.S. 575, 600 (1990). In *Taylor*, this Court made it clear that under the categorical approach, modified or not, once the proper part of the statute is identified, a court must look to only "the statutory definitions of the prior offenses, and not the particular facts underlying those convictions." The language of the Wisconsin statute is clear that while the first part may qualify as a violent felony since it requires the endangerment of others, the second part, in which no one is endangered, does not. Nonetheless, at footnote 1, the Government does exactly what *Taylor* forbids—it lists the "underlying facts" relating to Mr. Dismuke's fleeing conviction from the presentencing report. Opp. Br. at 3.

The Government also misapplies this Court's decision in *James v. United States*, 550 U.S. 192, 208

(2007). *James* requires a court to analyze "the conduct encompassed by the *elements* of the offense, in the *ordinary* case." *Id.* (emphasis added). The second part of the Wisconsin vehicular fleeing statute is violated if an individual attempts to "elude or flee" a police officer by "increase[ing] speed" or "extinguish[ing] the lights of the vehicle." Wis. Stat. § 346.04(3) (1998). Like the Seventh Circuit, the Government ignores these elements when determining whether the statute satisfies *Begay's* test. Rather, the Government lists the Fifth Circuit's and the Sixth Circuit's description of the dangers that arise when a police officer pursues a fleeing individual and the injuries that can result from that chase to officers and other individuals. Opp. Br. at 7-8 (quoting *United States v. Harrimon*, 568 F.3d 531, 536 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1015 (2009); *United States v. Martin*, 378 F.3d 578, 582-83 (6th Cir. 2004)). Regardless of what the Fifth and Sixth Circuit have asserted on this topic, it does not change the fact that not one line or element in the second part of the Wisconsin vehicular fleeing statute includes (1) pursuit by a police officer, (2) that a police officer be harmed, (3) that other individuals be harmed, or (4) that any property be put at risk. If none of the above-mentioned conduct is referenced in the relevant part of the Wisconsin fleeing statute, then the Government's description cannot be considered the *ordinary* case under the statute.

The Government's insistence on pursuit statistics suffers from this same flaw. The Government argues that data on the likelihood of physical injury resulting from the risk caused by violations under

the second part of Wisconsin's fleeing statute is necessary for this Court to rule on the issue. Opp. Br. at 12-13. But that argument is nonsensical. The elements of the statute specifically exclude from the second, nonviolent part of the statute all offenders who put any one at risk during their attempted flight. *See* Pet. App. at 15a-16a ("The first category is fleeing or attempting to elude an officer 'by willful or wanton disregard of [the officer's] signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians.'" (quoting Wis. Stat. § 346.04(3)) (alterations in original)). Thus, no statistics concerning the risk of physical injury are necessary for this case.

Accordingly, certiorari should be granted to correct further misapplication of this Court's ACCA precedent.

III. MR. DISMUKE DID NOT CONCEDE THAT HIS FLEEING CONVICTION PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY.

The Government conveniently omits the word "apparently" before its quote from this case regarding Mr. Dismuke's purported concession that the second part of Wisconsin's fleeing statute does not present a serious potential risk of physical injury. *Compare* Opp. Br. at 9, *with* Pet. App. at 17a. Mr. Dismuke did not "concede" the issue, and the Government's selective quote and failure to cite to any case law shows the weakness of its argument on this point.

Mr. Dismuke did what he had to do to preserve the issue when facing controlling circuit precedent to the contrary. He brought his argument to the court's attention and then cited the controlling precedent to the contrary. *See* Pet. Br. at 23 n.11 He did the same in his petition for rehearing *en banc*, *see id.*, which was denied. *See* Pet. App. at 52a. And while the Seventh Circuit suggested that Mr. Dismuke "apparently concede[d]" that Wisconsin's fleeing statute presents a risk of serious injury due to controlling precedent, the circuit fully addressed the issue in its opinion and acknowledged that both the Eighth and Eleventh Circuits had reached the opposite conclusion. Pet. App. at 17a n.3. Thus, the only time that Mr. Dismuke could "have reasonably expected that the validity of the earlier . . . [Seventh Circuit] decision would be questioned" would be before this Court. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980).

CONCLUSION

This Court should grant certiorari to resolve the deep and entrenched conflict and confusion that has arisen among the circuits regarding whether a fleeing statute, which criminalizes nonviolent conduct, is a violent felony under the ACCA.

Respectfully submitted,

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September 27, 2010